No. 86 1912

Supreme Court, U.S.
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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1986

WATSON TOTUS, et al.,

Petitioners,

v.

FRED HOLLY, et ux, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Where a tribal code provision expressly sets forth the disputed tribal authority, does an exception exist to this Court's exhaustion-of-remedies requirement, so that a district court should address the question of tribal powers before the tribal remedies are exhausted or the tribal powers are exercised?

2. Whether a district court may pass on the validity of an Indian tribe's water code regulating waters within a reservation in an action brought against individual members of the governing body promulgating the code?

LIST OF PARTIES

The following respondents were parties to the proceedings below: Fred Holly and Marian Holly, husband and wife; Herman R. Kuhnhausen and Violet R. Kuhnhausen, husband and wife; Darryl G. Lloyd and Susan H. Lloyd, husband and wife; Kenneth D. Sheridan and Frieda R. Sheridan, husband and wife; Russell L. Sprague and Isoline Sprague, husband and wife; Leon A. Conboy, a single person; Ada M. Conboy, a single person; Norman E. Troh and Anna E. Troh, husband and wife; Herman F. Kuhnhausen and Carrie H. Kuhnhausen, husband and wife; Arthur Ladiges and Mary Ladiges, husband and wife; Vern G. Addington and Mary Anita Addington, husband and wife; Paul Ladiges and Mary K. Ladiges, husband and wife; Harry C. Miller and Christine Miller, husband and wife; Douglas E. Troh and Anne Marie Troh, husband and wife; Roger T. Kuhnhausen and Carol E. Kuhnhausen, husband and wife; Nile L. Garrett and Ruby Garrett, husband and wife; Albert Booher and Thelma Booher, husband and wife; Daniel Holly and Sylvia Holly, husband and wife; Art Schuster and Charl Schuster, husband and wife; George Hathaway and Dee Hathaway, husband and wife; Francis T. Bean and Katherine N. Bean, husband and wife; Robert Seagle and Anita L. Seagle, husband and wife; James P. Clemmer and Jeanette Clemmer, husband and wife; Larry E. Kelley, a single person; Steve Kelley, a single

person; S. Wayne Vinyard, a single person; Henry Ladiges, Jr. and Lorene Ladiges, husband and wife; DeRowland Ward and Lela G. Ward, husband and wife; Jack H. Grubb and Norma J. Grubb, husband and wife; Delmar Q. Allbritton and Eula Allbritton, husband and wife; Public Utility District No. 1 of Klickitat County; the State of Washington; the City of Toppenish and the City of Wapato, Washington; the Washington State Department of Fisheries and the Washington State Department of Game.

The following petitioners were parties to the proceedings below and are involved in this petition: Watson Totus; Johnson Meninick; Joe Sampson; Roger Jim; Moses Dick Jr.; William Yallup; Harvey Adams; Anthony Washines; Mel Sampson; William Hoptowit; Levi George; Harris Teo; Russell Jim; Nelson Moses; Matt Goudy Jr.; Virginia Harrison; and Leonard Tomaskin.

The originally named defendants in the district court were the Confederated Tribes and Bands of the Yakima Indian Nation (hereinafter called the "Yakima Indian Nation"), the Yakima Tribal Council, one of the Yakima Nation's governing bodies, the Yakima Tribal Court and its Chief Judge, and the petitioners in their individual and official position. The Yakima Indian Nation, its governing Tribal Council, and the Yakima Tribal Court and Judge were dismissed from the case and the action continued individually against

the above-named petitioners who were named as defendants in their individual and official capacity in the Eastern District proceedings. Relief was awarded against the above named individual petitioners, some of whom were elected officials of the Yakima Indian Nation at the time of the enactment of the Yakima Indian Nation's Water Code.

The Confederated Tribes and Bands of the Yakima Indian Nation is comprised of fourteen originally distinct Indian tribes that joined together in the middle of the 19th century for purposes of their treaty relationships with the United States. A treaty was signed with the United States in 1855, under which it was agreed that the various tribes would be considered "one nation" and specified lands located in the Territory of Washington would be set aside for their exclusive use. The treaty was ratified by Congress in 1859. *Treaty with the Yakimas*, 12 Stat. 951. Since that time, the Yakima Nation has maintained its tribal identity without interruption. *Washington v. Yakima Indian Nation*, 439 U.S. 463, 469 (1979).

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IN THE

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OCTOBER TERM, 1986

WATSON TOTUS, et al.,

Petitioners,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners, individual members of the Yakima Indian Nation (herein called "Members"), respectfully pray that a writ of certiorari issue to review the judgment and opinion, entered in these proceedings on March 3, 1987, by the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The March 3, 1987 opinion of the Ninth Circuit (Table—812 F.2d 714) is unreported and is reprinted as Appendix A hereto, p. 1a, *infra*. The referenced opinion of the Ninth Circuit filed October 22, 1984 is

not reported and is reprinted as Appendix B hereto, p. 8a, *infra*.

The September 6, 1985 Memorandum and Order Granting Motion for Summary Judgment and the November 20, 1985 Order Denying Motion to Amend Except for Nunc Pro Tunc Corrections of September 6, 1985 Memorandum and Judgment of the Eastern District have not been reported. They are reprinted as Appendix C hereto, p. 12a, *infra*.

The January 31, 1979 Memorandum and Order of the Eastern District dismissing the Yakima Indian Nation, its governing Tribal Council, and the Yakima Tribal Court and Judge from the case and limiting the action against named tribal officials in their individual (and not official) status has not been reported. It is reprinted as Appendix D hereto, p. 24a, *infra*.

JURISDICTION

Invoking jurisdiction under 28 U.S.C. §§ 1331, 1343 and 2201, the respondents (then plaintiffs) sought to declare the Yakima Nation's Water Code void and enjoin its enforcement in the Eastern District of Washington. After the dismissal of the Yakima Nation, its Tribal Council, Court and Tribal Officials in their official capacity, the action continued against Members. The suit against these Members concerned them only as individuals residing, like the plaintiffs, in the State of Washington and was not continued against them in their official capacity. Petitioners have

challenged federal jurisdiction at all stages of these proceedings. On September 6, 1985, the Eastern District granted one of the respondents' motion for summary judgment declaring that these Members did not have authority to enforce a water code declared to be invalid as regards certain waters. On the appeal of Member petitioners, the Ninth Circuit, on March 3, 1987, entered an opinion affirming the Eastern District's order and judgment. This petition for writ of certiorari is filed within ninety (90) days of March 3, 1987. The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

TREATIES AND STATUTES INVOLVED

Involved portions of the treaties and statutes are reprinted in the appendixes hereto. The Preamble and an excerpt of Article II of the *Treaty with the Yakimas* are reprinted as Appendix E, p. 33a, *infra;* 25 U.S.C. §§ 1302 and 1303 are reprinted as Appendix F, p. 36, *infra;* 28 U.S.C. §§ 1331, 1343 and 2201 are reprinted as Appendix G, p. 38a, *infra.*

STATEMENT OF THE CASE

This case arises from the efforts of landholders within the Yakima Indian Reservation to have the Yakima Nation's Water Code declared null and void as regards waters on reservation non-trust lands. This case was commenced in the Eastern District against the Yakima Indian Nation, its Tribal Court and Judge,

and certain tribal officials, individually and in their official capacity.

On a motion to dismiss, the Eastern District determined that, because of the doctrine of sovereign immunity, it had no jurisdiction over the Yakima Indian Nation, its Tribal Council, its Tribal Court, or over tribal officials in their official capacity. *See* App. D. p. 26a, *infra.*

On amended and intervenor complaints, the case continued against Members in their individual capacity. These Members had been tribal officials at the time of the enactment of the Yakima Nation's Water Code and some of them had been on the Tribal Council that passed the Code. No other action had been taken by these Members against any respondent. On September 17, 1983, the Eastern District granted a motion for summary judgment and declared the Yakima Water Code void and unenforceable because an inapplicable penal provision was not expressly severable. In due course, this order and judgment were appealed to the Ninth Circuit by Members. On this first appeal, Members challenged the determination that a provision in the Yakima Nation's Water Code, which was not applicable to non-Indians, invalidated the Code in its entirety. Further, Members pressed the raised threshold issues of justiciability, standing, legislative and tribal immunity, and exhaustion as bars to the determination of invalidity by the Eastern District. In

its decision of October 22, 1984, the Ninth Circuit affirmed the Eastern District on these threshold issues, but reversed the Eastern District's determination that the inapplicability of the penal section voided the Code. *See* App. B, p. 9a, *infra.*

On remand and on September 6, 1985, the Eastern District on Summary Judgment by Memorandum and Order Granting State's Motion for Summary Judgment, as corrected by its Order of November 20, 1985, determined that the Yakima Nation's Water Code was invalid as to its regulation of non-member use of "excess" waters and declared that petitioning Members did not possess authority to enforce the void provisions. *See* App. C, p. 19a, *infra.*

In due course, this determination and judgment were appealed to the Ninth Circuit. On this second appeal, the Ninth Circuit again rejected the following issues raised by petitioners: (1) whether the doctrine of immunity protects Members from this suit; (2) whether this suit is premature because tribal remedies were not exhausted; and, (3) whether a justiciable case and controversy has been presented. Further, in its Memorandum of March 3, 1987, the Ninth Circuit determined that the Yakima Water Code is invalid to the extent it purports to bestow tribal regulatory powers over the use of "excess" waters and affirmed the Eastern District. *See* App. A, p. 2a, *infra.*

It is agreed that the Yakima Nation and its mem-

bers have reserved treaty water rights to the use of waters within the exterior boundaries of the Yakima Indian Reservation. *See* App. H, p. 44a, *infra.* It is agreed that the Yakima Indian Nation has promulgated that all of the waters that underlie, arise upon or flow through or along the border of the Yakima Indian Reservation are reserved for the beneficial use of its members as needed. *See* App. H, p. 44a, *infra.* This is the provision that the Eastern District and the Ninth Circuit claim exempts this action from this Court's exhaustion of tribal remedies requirement. It is agreed that, in 1982, parts of these waters were used both within and outside the boundaries of the reservation by non-Indians. *See* App. H, p. 44a, *infra.* It is agreed that the Yakima Indian Reservation, exclusive of the Glenwood area, contains 1,223,844 acres, and 1,121,220 of these acres are held in trust by the Unitetd States for the Yakima Nation and other Indian allottees. Indians hold fee lands within this main portion of the reservation in the amount of 3,202 acres, and non-Indians hold 99,422 acres. *See* App. H, p. 42a, *infra.* (E.R. p. 235; C.R. 108.) In the Glenwood area approximately 97,909 acres of the 100,457 acres are patented. *See* App. H, p. 42a, *infra.*

It is agreed that the non-governmental respondents are non-Indian citizens of the State of Washington who claim ownership of land within the reservation and are users of water in the Glenwood area. The State of

Washington also claims ownership of land and water rights in the reservation and is a user of water within the reservation. Some plaintiffs hold state permits and claim a right to use water based on state law, while others claim rights to use water based on a state adjudication decree wherein none of the defendants or the Yakima Nation was a party. *See* App. H, p. 43a, *infra.*

The Yakima Indian Nation has promulgated a water code (Resolution No. T-79-77) to administer reserved waters within the Yakima Indian Reservation. This is the document in question and is referred to herein as the "Yakima Nation's Water Code" or "Water Code". It is agreed that petitioners, then members of the Yakima Tribal Council, collectively prepared, promulgated and made effective the Yakima Nation Water Code. *See* App. H, p. 40a, *infra.*

It is agreed that the Yakima Nation Water Code has not, at any time, before the commencement of this suit or thereafter, been enforced by the Yakima Indian Nation against any of the respondents. *See* App. H, p. 45a, *infra.*

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit opinions directly conflict with the rule of this Court declaring it is premature for a district court to determine limits to tribal powers of self-government before tribal remedies are exhausted.

This Court has made it clear in *National Farmers*

Union Insurance Company v. Crow Tribe, 471 U.S. 845 (1985), and later in *Iowa Mutual Insurance Company v. La Plante*, 480 U.S. __, 94 L.Ed.2d 10, 107 S. Ct. 971 (1987), that it is premature for a district court to determine that an Indian tribe has exceeded the lawful limits of its authority until available tribal remedies have been exhausted. In announcing and discussing this exhaustion rule, this Court noted that the Court-recognized congressional policy supporting tribal self-government and self-determination favors this exhaustion requirement. *National Farmers Union, supra*, at 471 U.S. 857, *et seq.; Iowa Mutual Insurance Co., supra*, at 94 L.Ed.2d 18, *et seq.*

As this Court has noted, this rule follows the Federal policy regarding tribal self-government, provides for orderly administration of justice, limits procedural problems, encourages the tribal courts to explain their basis for jurisdiction, and provides reviewing courts with the benefit of the tribal proceedings and expertise. *Id.* We further note that this rule also favors the availability of justice and conservation of federal judicial resources supported by this Court. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817, 820 (1976).

The wisdom of this exhaustion rule can be clearly demonstrated by the instant case. The only action that has been taken by petitioning Members is the enactment of the Yakima Nation's Water Code. A Water Board,

composed of a non-member majority, was established by the Code to administer its provisions. No action has ever been taken by petitioning Members, or any other agent of the Yakima Nation, against any of the respondents or any water user, that has limited their use of waters within the Yakima Indian Reservation. However, without taking any action to exhaust their remedies before this Water Board or the Tribal Court, this action was brought in the Eastern District. The Yakima Nation has never had an opportunity to determine if there are "excess" waters or if it wishes to regulate their use. The action was brought and sustained by both the Eastern District and the Ninth Circuit on the basis that the power to assert authority over these "excess" waters was expressly asserted by the Yakima Nation's Water Code and that any interpretation by a tribal forum would be futile. No proof of the futility was provided or offered. This action against the Members, who only promulgated the Water Code, has been most premature and damaging to the political integrity of the Yakima Indian Nation.

The decisions announced by the Ninth Circuit provide, that where a tribal code expressly asserts disputed authority, no exhaustion of remedies is required. (App. B, p. 10a.) This Court has indicated that exhaustion would not be required where: (1) an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith; or (2) where exhaustion

would be futile because of a lack of adequate opportunity to challenge the court's jurisdiction. *National Farmers Union, supra,* at 471 U.S. 856, n21; *Iowa Mutual Insurance Co., supra,* at 480 U.S. __, 94 L.Ed.2d 22, n12. These exemptions do not exist here.

This ruling of the Ninth Circuit undermines tribal self-government, thus violating policy recognized and fostered by this Court. This right of self-government was implicitly and explicitly guaranteed to the Yakima Nation by treaty, and is within the Federal Government's longstanding policy of encouraging tribal self-government. The *Treaty with the Yakimas,* 12 Stat. 951, clearly states that the signatory fourteen tribes and bands for the "purpose of this treaty are to be considered one nation". In *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 560-561, this Court determined that the use of the treaty term "nation" called for the retention of powers of self-government like other nations.

The *Treaty with the Yakimas, supra,* set the Yakima Indian Reservation apart for the exclusive use of the Yakimas. This Court determined that this language provided for internal affairs remaining exclusively with the tribal government. *Williams v. Lee,* 358 U.S. 217, 221 (1958). Far from being an anomoly, the Yakima Nation's reserved right to control its internal affairs may be more clear than that of other tribes. From *Worcester v. Georgia, supra,* through *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 332

(1983), this Court has emphasized that Indian tribes constitute "political communities", enjoying substantial "sovereign" powers over both members and non-members within their reservations. Looking only to the last twenty-five years, this Court has made this point no less than a dozen times. *See: Williams v. Lee*, 358 U.S. 217, 223 (1959); *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685, 690-692 (1965); *Kennerly v. District Court*, 400 U.S. 423, 426-427 (1971); *United States v. Mazurie*, 419 U.S. 544, at 557-558 (1975); *United States v. Antelope*, 430 U.S. 641, 645 (1977); *United States v. Wheeler*, 435 U.S. 313, 323 (1978); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-154 (1980); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142, 151 (1980); *Montana v. United States*, 450 U.S. 544, 565-566 (1981); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140, 146-148 (1982); *Ramah Navajo School Board, Inv. v. Bureau of Revenue*, 458 U.S. 832, 837-838 (1982); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-336 (1983).

Strong federal policy and comity concerns favor exhaustion of remedies in a non-federal forum, before the federal judiciary is burdened with such a determination. If the exception outlined in the Ninth Circuit decisions is to be established, it is an important

queston requiring plenary determination by this Court.

II. The Ninth Circuit opinion directly conflicts with the rule of this Court declaring that, absent congressional act or intent, Indian tribes possess immunity from suit

This Court has made it clear in *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978), and cited cases therein, that Indian tribes have long possessed the common-law immunity from suit traditionally enjoyed by sovereign powers. This aspect of tribal sovereignty is subject to the plenary control of Congress. *Id.*

Relying solely on an out-of-context phrase from *Santa Clara Pueblo v. Martinez, supra,* the Ninth Circuit determined that a district court may pass on the validity of the Yakima Nation's Water Code because the action is against the individual tribal officers. (App. B, p. 9a, "Nor are individual tribal officers 'protected by the tribe's immunity from suit.' *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 59 (1978)."

In so holding, the Ninth Circuit ignores the rest of the opinion and this Court's prohibition against doing indirectly what cannot be done directly by bringing a suit against tribal officials rather than the tribe. This Court's direct holding is that a federal action for declaratory and injunctive relief against tribal officers to determine the validity of a tribal ordinance is not authorized. *Santa Clara v. Martinez,* 436 U.S. 49, 62-67, 72 (1978). This Court clearly provided guid-

ance on this point for the federal courts which the Ninth Circuit chose to ignore. In a lengthy discussion, this Court pointed out that Congress has power to authorize civil action against tribal officers and does so by providing exclusive habeas corpus relief in the enactment of the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1302-1303. *See* App. F, p. 36a, *infra*. This Court further held that actions for declaratory or injunctive relief are not authorized against either a tribe or its officers until Congress expressly grants this remedy. *Id.*

This specific rule is in conformity with this Court's general rule regarding compulsion in the form of junctive or declaratory relief, though nominally directed against an individual officer. In such a case the suit is barred, because the suit is really against the sovereign over which the court, in the absence of consent, has no jurisdiction. *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 687 (1949).

It is clear that the Ninth Circuit has attempted to do indirectly what the Eastern District correctly held it could not do directly. (Memorandum and Order dated January 31, 1979 determining that this action could not be brought against the Yakima Nation, its Tribal Council, its Tribal Court and Judge, or over tribal officials in their official capacity. App. D, p. 26a.) The Ninth Circuit decision violates the holdings of this Court.

CONCLUSION

The petition for writ of certiorari should be granted. If the decisions discussed herein provide sufficient guidance as to the questions raised, the judgment of the Ninth Circuit should be remanded for reconsideration in light of this Court's instructions. Otherwise it should be heard on the merits here, the judgment of the Eastern District and the Ninth Circuit decision vacated and remanded for dismissal of the action.

Respectfully submitted,

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May 29, 1987

APPENDIX

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 85-4436 — D.C. No. CV 78-02-JLQ

FRED HOLLY and MARIAN HOLLY, husband and wife; HERMAN R. KUHNHAUSEN and VIOLET KUHNHAUSEN, husband and wife; DARRYL G. LLOYD and SUSAN H. LLOYD, husband and wife; KENNETH D. SHERIDAN and FRIEDA R. SHERIDAN, husband and wife; et al.,

Plaintiffs/Appellees,

and

CITY OF TOPPENISH and CITY OF WAPATO, Washington, municipal corporations,

Plaintiffs/Intervenors,

v.

WATSON TOTUS; JOHNSON MENINICK, Vice Chairman; JOE SAMPSON, ROGER JIM, MOSES DICK JR., WILLIAM YALLUP, HARVEY ADAMS, et al.,

Defendants/Appellants.

On Appeal from the United States District Court for the Eastern District of Washington

Hon. Justin L. Quackenbush, District Judge, Presiding.

Argued and Submitted — December 3, 1986
Seattle, Washington

Filed — Mar - 3 1987

MEMORANDUM*

* This disposition is not intended for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

Before: BROWNING, WRIGHT, and BOOCHEVER, Circuit Judges.

In this appeal we will initially address the Council's claims regarding the law of the case doctrine before delving into the Council's central argument.

Law of the Case

The Council raises three issues that were settled by this court on the first appeal: (1) whether the doctrine of immunity protects the council members from this suit, (2) whether this suit is premature because the state did not exhaust the tribal remedies, and (3) whether a justiciable case and controversy has been presented. The Council argues that on the first appeal, the panel did not wish its October 12, 1984, memorandum to be precedent for any purpose. Under Ninth Circuit Rule 21, however, a memorandum is precedent when relevant under the doctrine of law of the case. That doctrine prevents one panel of an appellate court generally from reconsidering a question that another panel has decided on a prior appeal in the same case. *Kimball v. Callahan*, 590 F.2d 768, 771 (9th Cir.), *cert. denied*, 444 U.S. 826 (1979). "[T]he prior decisions of legal issues should be followed on a later appeal unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work manifest injustice." *Kim-*

ball, 590 F.2d at 771-72 (quoting *White v. Murtha*, 377 F.2d 428, 431-32 (5th Cir. 1967)). There is no evidence to warrant a departure from the law of the case doctrine. The Council does not argue that jurisdictional issues have changed since the first appeal. Instead they argue that because the district court's second judgment is different from the first, new questions were raised by the second judgment that were not considered by the first panel. Regardless of the merit of this contention, the specific jurisdictional issues determined by the first panel are the same here and the Council fails to produce evidence warranting a departure from the law of the case doctrine. For the purposes of this case, the Council is not protected by tribal or legislative immunity, the state is not required to exhaust tribal remedies, and a justiciable case and controversy has been presented.

DISCUSSION

This case fits into the rationale of our recent decision in *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984). Initially, it is not disputed that the grant of the Yakima Indian Reservation implies water rights under the *Winters* doctrine. *Winters v. United States*, 207 U.S. 564 (1908). In *Anderson*, the Spokane Tribe argued that they, not the State of Washington, had regulatory jurisdiction over non-Indian use of excess Chamokane Basin waters on non-Indian owned lands located within the Spokane Indian Reservation. The

Chamokane Basin hydrological system includes the Chamokane Creek, its tributaries and its groundwater basin. The Chamokane Creek originates north of the reservation and flows south a considerable distance before encountering the reservation. The creek then forms the eastern boundary of the reservation, separates from the reservation, and flows into the Spokane River. *Anderson*, 736 F.2d at 1361. The *Anderson* court concluded "that the state, not the Tribe, has the authority to regulate the use of excess Chamokane Basin waters by non-Indians on non-tribal, i.e., fee, land." *Id.* at 1365. The court found no consensual agreement between the tribe and the non-Indian water users or conduct which threatened or had such a " 'direct effect on the political integrity, the economic security, or the health or welfare of the Tribe,' as to confer tribal jurisdiction." *Anderson*, 736 F.2d at 1365 (quoting *Montana v. United States*, 450 U.S. 544, 566 (1981)).

The *Anderson* court then applied a preemption analysis to determine the State of Washington's authority to regulate the excess waters. The court stated that water contained within the exterior boundaries of an Indian reservation does not necessarily negate the state's obligation to regulate water consumption in conjunction with other state water systems. Washington's regulatory obligation is for the benefit of all its citizens, including those owning fee land within an

Indian reservation. *Id.* at 1366; *see also* 25 U.S.C. § 349. When water is located within the boundaries of both the state and the reservation, the state's interest runs concurrently with tribal concerns. The creek in *Anderson* was not exclusively in the reservation but formed the eastern boundary and then separated from the reservation and flowed into the Spokane River. The hydrology and geography of the Chamokane basin emphasized the State of Washington's interest in developing a comprehensive water code to regulate surplus waters, including excess waters on the reservation. Hence, in balancing the various state, tribal, and federal interests, the court concluded that the state may regulate the excess waters on the Spokane reservation.

The Council argues that the Yakima Indian Nation has the broad power to regulate reservation waters used by non-Indians on deeded land. This argument encompasses more than the narrow regulatory issue that we need presently decide. The district court specifically did not determine which sovereign, federal or state should excess waters.[1] Nor did the court consider

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[1] We are not reviewing or applying a preemption anlysis. Such a review is outside the scope of this action. Nor are we considering the range of authority that the Council has over any reserved water rights. The reservation's water rights are currently being adjudicated in *State of Washington v. Acquavelle,* cause No. 77-2-01484-5. While the state has been issuing water right permits to non-Indian users, we note that these permits are limited to excess water rights and may, in fact, convey no rights at all. *See Anderson,* 736 F.2d at 1365.

the extent to which the Yakima Nation may regulate reserved waters and/or ground waters with or without the concurrence of the United States. The issue on appeal revolves around the district court's holding that the Yakima Nation Water Code is invalid as to the non-Indian use of excess waters on or passing through non-Indian owned land within the Yakima Indian Reservation and, therefore, the Council does not have the authority to enforce the invalid provisions. The thrust of the Council's argument is based on the allegations that tribal regulation of these waters is critical to the lifestyles of the tribe. Nowhere are specific facts alleged to support this contention or the allegation of a lack of any excess water. The Council fails to rebut the district court's specific findings on the existence of excess waters used on non-Indian lands in a situation very similar to *Anderson*. The district court found, and we agree, that the state met its burden of demonstrating a peaceful co-existence of the non-Indian water users with the tribe. The Council failed to produce sufficient evidence to show the non-existence of excess waters or that regulation of excess waters by the State threatened or had a direct effect on the political integrity, economic security, or health and welfare of the tribe. Nor did the Council show that any of the non-Indians entered into a consensual relationship with the tribe that would subject the non-Indian to tribal jurisdiction. We agree with the district court's con-

clusion that under these circumstances, the Council did not have the power to regulate excess water use by non-Indians on non-Indian fee land. Thus, we hold that the Yakima Nation Water Code is invalid to the extent it purports to bestow tribal civil regulatory authority over such use of excess waters.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA No. 84-3541 — DC No. 78-02-JLQ

FRED HOLLY and MARIAN HOLLY, husband and wife, et al.,

Plaintiffs/Appellees,

and

CITY OF TOPPENISH and CITY OF WAPATO, Washington Municipal Corporations,

Plaintiffs-Intervenors/Appellees,

and

WATSON TOTUS, et al.,

Defendants/Appellants.

Appeal from the United States District Court
for the Eastern District of Washington

Honorable Justin L. Quackenbush, District Judge, Presiding

Argued and Submitted September 6, 1984

MEMORANDUM*

BEFORE: WRIGHT, PREGERSON & CANBY, Circuit Judges

Individual members of the Yakima Tribal Council (hereafter "council members") appeal from a summary judgment invalidating the Yakima Water Code and enjoining its enforcement. Council members chal-

* The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the *Federal Reporter*, and that this memorandum may not be cited to or by the courts of this circuit.

lenge the district court's determination that the Code's penal provision, which improperly was made applicable to non-Indians, invalidated the Code in its entirety. Council members also raise the threshold issues of justiciability, standing, legislative and tribal immunity, and exhustion as bars to jurisdiction below.

I. **Threshold issues**

The Code purports to regulate waters claimed by appellants, and includes a filing requirement which, in the event of failure to file, operates as a self-executing abrogation of appellants' interests. Appellees have alleged that the value of their lands is dependent upon these water rights. Appellees have accordingly established both standing and a justiciable controversy. *See Warth v. Seldin*, 422 U.S. 490, (1975); *Western Mining Council v. Watt*, 643 F.2d 618, 628 (9th Cir.), *cert. denied*, 454 U.S. 1031 (1981).

Since council members' code vests them with administrative, regulatory, and adjudicatory authorities, the doctrine of legislative immunity does not insulate them from suit. *See Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 734-36 (1980). Nor are individual tribal officers "protected by the tribe's immunity from suit." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978). Although council members are correct in contending that habeas corpus represents the sole avenue for federal judicial review of alleged violations of the Indian Civil Rights Act, *id.*

at 67, none of appellees' ICRA claims is presently before us. To require exhaustion of tribal remedies where the tribe's water code expressly asserts the very authority appellees dispute would also be to compel an entirely futile gesture. *See generally,* K. Davis, 4 *Administrative Law Treatise* § 26:11 (1983); *Southeast Alaska Conservation Council v. Watson,* 697 F.2d 1305, 1309 (9th Cir. 1983).

Finding no bar to jurisdiction below, we affirm the district court's denial of council members' motion to dismiss.

II. **Summary Judgment**

Relying upon *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978), the district court correctly found the water code's penal provision inapplicable to non-Indians. We reverse, however, the court's holding that the penal provision was non-severable and voided the code in its entirety. There was no showing of legislative intent to support the conclusion of non-severability. *Oliphant* does not alter the penal provision's applicability to tribal members. Furthermore, even without its criminal sanctions, the remaining civil and regulatory provisions of the code — which may serve as the statutory predicate for legal proceedings — leave " 'what is left . . . fully operative as a law.' " *Buckley v. Valeo,* 424 U.S. 1, 108 (1976) (per curiam)

(quoting *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234 (1934)). .[1]

AFFIRMED in part, REVERSED in part, and REMANDED. Costs in favor of appellants.

[1] In reversing, we express no opinion on the plaintiffs' other challenges to the validity of the tribal water code. The district court has not yet ruled on these issues and we do not reach them.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
NO. C-78-002-JLQ

FRED AND MARIAN HOLLY, et al.,

Plaintiffs

vs.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, an Indian Nation or Tribe established by Treaty with the United States, et al.,

Defendants

MEMORANDUM AND ORDER GRANTING STATE'S MOTION FOR SUMMARY JUDGMENT

The procedural background for this water rights action and undisputed facts are set forth in the court's earlier memorandum and will not be repeated. See Ct. Rec. 134. Summarized in that document also is a preliminary discussion of the issues raised by this litigation. This memorandum serves only to memorialize the court's oral ruling of July 11, 1985, that the Confederated Tribes and Bands of the Yakima Indian Nation (Yakima Nation), do not have inherent power to regulate or administer non-Indian excess waters flowing through the Reservation.

By its motion, the state seeks a declaration that the Yakima Nation Water Code (the Code) adopted by the Tribal Council in May, 1977, is invalid. Two years ago, this court so concluded by reason of the penal provisions of the Code which could have been

applied in Tribal Courts against non-Indians. On review, the Ninth Circuit affirmed in part. However, the Circuit, by memorandum, determined the unlawful penal provision did not invalidate the Code in its entirely. Accordingly, the matter was remanded.

Meriting mention is the Yakima Nation's recent contention that the issues before the court are moot because the Yakima Nation has stayed enforcement of the Code and plans to change the promulgation in some respects. Yet, the Code remains in existence, and the claim nonetheless satisfies the elements of the "capable of repetition, yet evading review" exception to the mootness doctrine. *Wiggins v. Rushen*, ___F.2d___, Slip Op. No. 83-1719 (9th Cir. May 17, 1985) citing *Roe v. Wade*, 410 U.S. 113 (1973). That is, the parties may "reasonably" expect to be subjected to the Code at a later date. More significantly, however, the Ninth Circuit, by mandate, has directed the court to address the question of Code validity. Similarly, the Tribe's "exhaustion" contention was decided by the Circuit adversely to the Tribe. As such, that ruling also remains the law of the case.

Preliminarily, it is noted that when the United States sets aside a reservation of land, it impliedly reserves water then unappropriated in sufficient quantity to accomplish the purposes of the federal reservation. *United States v. New Mexico*, 438 U.S. 696, 698-700 (1978). Hence, Indian tribes hold reserved

water rights. *Winters v. United States*, 207 U.S. 564, 577 (1908). Unlike appropriative rights created under state law, which are defined by actual diversion and continued beneficial use of waters from natural channels, Indian *Winters* rights reserve a paramount right to the use of as much water which is in contact with the reservation as is needed to fulfill the primary purposes for which the land was reserved. *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981) (*Walton* II). "Excess" waters are those stream waters, to be distinguished from ground water, which are over and above those used to satisfy *Winter* rights. 647 F.2d at 327.

The Code in question is comprehensive, purporting to regulate all waters underlying, arising upon or flowing through or along the border of the Reservation. To determine whether the Yakima Nation's sovereign power is sufficient to apply its Code to nonmembers of the Tribe using excess waters on fee lands requires analysis under *Montana v. United States*, 450 U.S. 544 (1981). While Indian tribes possess inherent sovereign power over their members and their territory, 450 U.S. at 563, due to their "original incorporation into the United States," exercise of tribal power beyond that necessary to protect tribal self-government is deemed inconsistent with its "dependent status". 450 U.S. at 464-65. Therefore, such inherent power was

held not to survive without express congressional delegation. 450 U.S. at 564-65. Because tribes may not exercise power inconsistent with this diminished sovereign status, Indians have lost the right to govern nonmembers residing within Reservations except in certain instances. 450 U.S. at 565. More importantly in this case, a tribe also retains inherent power to civily regulate the conduct of non-Indians on fee lands "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566.[1]

Significantly, in a case arising in this district, the reviewing court held that conduct threatening the health or welfare of an Indan tribe may include conduct involving the tribe's water rights. *Walton* II, 467 F.2d at 52. In *Walton*, a non-Indian's water appropriation imperiled the Colville Confederated Tribes' downstream use of agricultural and fisheries water. On the other hand, a contrary conclusion was reached, under different circumstances, in a later action also initiated in this district. See, generally, *United States v. Anderson*, 736 F.2d 1358, 1365 (9th Cir. 1984) (political and economic welfare of the Spokane Tribe unaffected by the conduct of nonmembers using excess water on fee land).

[1] This retained civil authority over non-Indians is not only a self-government notion, but also derives form the power to exclude nonmembers from tribal land. *United States v. Anderson*, 736 F.2d 1358, 1364 (9th Cir. 1984).

Here, for purposes of this motion, it is undisputed that surplus waters exist and are used by non-Indians on Reservation fee land and off the Reservation.[2] As the facts demonstrate, the state has met its burden of demonstrating a peaceful co-existence of the non-Indian water users with the Tribes. The Yakima Nation has not come forward with facts to show existence of a material factual question with respect to whether non-Indian conduct related to non-Indian use of excess waters threatens the political integrity, economic security, or health and welfare of the Tribes. Nor have the non-Indians entered into agreements or dealings with the Tribes with a result of subjecting themselves to tribal civil jurisdiction. Consequently, the inescapable conclusion is the Yakima Nation has not retained the power to regulate excess water use by non-members on their fee land within or without the Reservation. It follows, then, that the Code is invalid to the extent

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[2] Although the existence of excess waters is stipulated, Ct. Rec. 134 at 8, such waters have only been partly quantified. That is, in the Glenwood Area a general adjudication (quantification) occurred in *In the Matter of the Determination of the Rights to the Use of Bird & Braser Creeks. State v. Bartholomew, et al.,* Klickitat County Washington Superior Court Decree entered March 14, 1921. See Stipulated Fact 8, Ct. Rec. 134 at 6. The various remaining water systems, which serve users within and without the Reservation, are currently undergoing general adjudication in *State v. Aquavella,* Yakima County Superior Court Cause No. 77-2-01484-5 (Stauffacher J.).

For purposes of this motion, the court considers the Glenwood area as within the Reservation boundaries.

it purports to bestow upon the Yakima Nation civil regulatory jurisdiction over non-Indians of surplus waters.

In so concluding, this court has not been asked to determine which sovereign, federal or state, should regulate excess waters. Such a consideration is outside the scope of this action, as it would require a pre-emption analysis informed by detailed factual development with the participation of the United States as a party. See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980). (Analysis of whether a state may regulate non-Indian conduct on a Reservation requires "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context the exercise of state authority would violate federal law.")[3] See, also, Ct. Rec. 134 at 20. Nor does

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[3] After concluding, under a *Montana* analysis, that the economic welfare of the Colvilles was threatened by Non-Indian use of the unitary water system in *Walton* II, the panel went on to additionally hold, under a pre-emption mode, that the state could not regulate water in that system. 647 F.2d at 52. Factually, this was so because the stream was small, non-navigable, and flowed entirely within the Reservation. 647 F.2d at 53. Although some land served by the unitary, adjudicated stream system was in non-Indian ownership, it was also within Reservation boundaries. Finally, the non-Indian lands were purchased allotted lands rather than public domain lands. 647 F.2d at 53 & n.16. Under its narrow ruling, the court found it unnecessary to decide whether the regulatory power resided exclusively in the Tribe, in the federal government, or whether it was to be exercised jointly. 647 F.2d at 52. It simply concluded the state could not regulate because tribal and/or federal control did not impact off-reservation state water rights. 647 F.2d at 53.

In *Anderson,* 736 F.2d at 1365-66, the state was not pre-empted from exercising its regulatory jurisdiction over the use of surplus, non-reserved waters by non-members on non-fee lands within the Spokane Reservation. The "particularized inquiry", *Bracker,* 448 U.S. at 145, of the stat's interest, in the context of an adjudicated stream system which continued for a considerable length outside the reservation weighed heavily against the competing federal and tribal interests. 736 F.2d at 1366. As discussed in this court's earlier Order, Ct. Rec. 134 at 15-17, the state, tribal and federal interests in this case are unlike the factual underpinnings of *Walton* II or *Anderson.*

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the court decide the extent to which the Yakima Nation may regulate reserved waters and/or ground waters with or without the concurrence of the United States.

Lastly, the court is mindful of the Circuit's recent teachings in *South Delta Water Agency v. United States,* ____F.2d____, slip op. 84-1758 (9th Cir. July 26, 1985), decided after this court's oral ruling in the instant case. In *South Delta,* an action not directly involving Indian water rights, public and private water use holders brought a declaratory action against the federal and California governments alleging defendants were operating their facilities in a manner which violated plaintiffs' federal and state law rights. Logically, opined the reviewing court, where "there has been no prior adjudication of relative stream water rights," a court cannot adjudicate the administration of those rights within the meaning of the McCarran Amendment (43 U.S.C. § 666(a)(2)). *South Delta,* slip op. at 18-19. However, in so concluding, the appellate court nonetheless found trial court jurisdiction to

hear the matter against the United States, because the McCarran Amendment was not meant to address "the entire field of water law litigation involving the federal government." *South Delta* at 20. More importantly here, the Circuit has already resolved the threshold jurisdictional issue by mandating this court address the water rights administration question, in this case, Code validity.

IT IS ORDERED the state's Motion for Summary Judgment, joined by the municipal and individual plaintiffs, is GRANTED. The Clerk of the Court is directed to enter judgment that the Yakima Nation Water Code, adopted in May, 1977, is invalid as to non-member use of excess waters on or passing through the Yakima Indian Reservation.

DATED this 6th day of September, 1985.

ss._____

JUSTIN L. QUACKENBUSH
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
NO. C-78-002-JLQ

FRED AND MARIAN HOLLY, husband and wife

Plaintiffs

vs.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, et al.,

Defendants

ORDER DENYING MOTION TO AMEND EXCEPT FOR *NUNC PRO TUNC* CORRECTIONS OF SEPTEMBER 6, 1985 MEMORANDUM AND ORDER AND JUDGMENT

THIS ORDER shall serve to memorialize the court's oral ruling of November 18, 1985, denying, in greater part, defendants' Motion to Amend Judgment. Defendants are tribal officials sued for injunctive relief in their individual capactities. In essence, defendants complain this court's memorandum decision that the Yakima Nation's Water Code of 1977 is invalid as to non-member use of excess waters is not a judgment against individuals. Rather, argue defendants, this holding has nothing to do with the individual defendants and instead strikes at the Yakima Nation which is immune from suit.

The issues of jurisdiction, exhaustion, and immunity have been thoroughly briefed, argued and ruled upon, not only by Judge Neill and by this judge, Ct.

Rec. 55, 134 and 168, but also by the Ninth Circuit Court of Appeals in its unpublished memorandum, *Holly v. City of Toppenish*, CA-84-3541, dated October 22, 1984, which Order is now the law of the case.

As the reviewing court clearly held, since the challenged Code vests defendants with "administrative, regulatory, and adjudicatory authorities," CA-84-3541 at 2, the doctrines of legislative and tribal immunity do not shield the officials, individually, from suit. Accordingly, the reviewing court, which reversed this court's earlier decision in part, affirmed denial of defendants' motion to dismiss and remanded the case for further proceedings. Under the circuit's holding, it was then necessary for this court to again evaluate the validity of the Code to determine whether defendants should be enjoined from acting in their executive and administrative capacities by way of enforcing the Code against non-member use of excess waters. Indeed, this court is unaware of a way to comply with the circuit's directive except by determining the validity of the Code. This is so notwithstanding the exhaustion principles enunciated in *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, ____U.S.____, 53 U.S.L.W. 4649 (June 3, 1985) decided after the circuit's decision in this action. In *Crow Tribe* at n.21 and the accompanying text, the high Court concluded the "existence and extent" of "tribal court" jurisdiction should be examined "in the first instance" by "the

Tribal Court itself" except where "exhaustion would be futile." As held by the Ninth Circuit in the instant matter, "[t]o require exhaustion of tribal remedies where the tribe's water code expressly asserts the very authority appellees dispute would also be to compel an *entirely futile gesture.*" Emphasis added. CA No. 84-3541 at 2.

In so concluding, however, it is appropriate to add the following clarifying language to the court's Order dated September 6, 1985. At page 5, lines 12-13 of Ct. Rec. 168, the word "defendants" is substituted for the term "The Yakima Nation." Also, the following sentence is added at the end of the first paragraph, line 11, at page 6. "Thus, to the extent defendants seek to administrate, regulate, and adjudicate non-Indian use of surplus water, under the power of the Code, defendants are proceeding without authority and are not insulated from suit. *Holly v. City of Toppenish,* CA-84-3541 Unpublished Memorandum (9th Cir. 10/22/-84); Ct. Rec. 55 at 2 and 134 at 2." Lastly, at page 8, line 21, the following sentence is substituted for the last sentence in the paragraph: "The Clerk of the Court is directed to enter judgment that since the Yakima Nation Water Code, adopted in May, 1977, is invalid as to non-member use of excess waters on or passing through the Yakima Indian Reservation, defendants do not possess authority to enforce the void provisions." To this extent, also, the court's Judgment, at Ct. Rec.

169, dated September 6, 1985, is AMENDED, *nunc pro tunc.*

IT IS SO ORDERED. The Clerk is directed to enter this Order and forward copies to counsel.

DATED this 20th day of November, 1985.

ss._____

JUSTIN L. QUACKENBUSH
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
No. C-78-2

FRED HOLLY AND MARIAN HOLLY, husband and wife, et al., ex ux,

Plaintiffs,

-vs-

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, an Indian Nation of Tribe established by treaty with the United States, et al.,

Defendants.

CITY OF TOPPENISH AND CITY OF WAPATO WASHINGTON MUNICIPAL CORPORATIONS,

Intervenors.

MEMORANDUM AND ORDER

This action is brought by the State of Washington and by individual non-Indians and corporations who allegedly own land either within or near the Yakima Nation Reservation within the State of Washington. Defendants include the Yakima Indian Nation, the Yakima Tribal Council, all members of the Tribal Council individually and in their official capacities, and the Chief Judge of the Tribal Court, individually and in his official capacity.

Plaintiffs seek to enjoin the application and enforcement of the Yakima Nation Water Code, adopted by the Tribal Council in May, 1977. Plaintiffs assert that defendants do not have jurisdiction over the land, real property interests or water rights of plaintiffs and

that application of the Code to plaintiffs would violate their rights under federal law.

Defendants move to dismiss asserting that defendants are immune from suit because of sovereign immunity; that the action is not ripe because of failure to exhaust tribal remedies; that this Court has no jurisdiction over defendants; and that the plaintiffs have failed to state a claim upon which relief can be granted.

The Supreme Court has recently dealt with the issue of tribal immunity from suit in federal courts. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978). In *Martinez* the Court held that the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. §§1301-1303 (1970), did not abrogate Indian tribes' sovereign immunity. In light of the Supreme Court's reasoning in *Martinez,* no other statute may be deemed to have waived such sovereign immunity. *Martinez* indicates that officers of the tribes are not covered by this immunity, although the opinion does not deal with this issue in detail. This Court concludes that the approach applied to immunity of federal officers also must be applied to tribal officers. This approach permits officers to be sued in their individual capacities when they act outside of their authority or when the authority under which they act is void. *See Larson v. Domestic and Foreign Commerce Corp.,* 337 U.S. 682 (1949).

Therefore this Court holds that it has no juris-

diction over the Yakima Indian Nation, over the Yakima Tribal Council, or over the tribal officials in their official capacities. However, because plaintiffs have in effect alleged that tribal officials' authority under the Yakima Water Code is void under federal law, the claims for relief against these tribal officials in their individual capacities is not barred by sovereign immunity.

This Court also concludes that the action against the Chief Judge of the Yakima Tribal Court must be dismissed. There is no present controversy with the Tribal Court or the Judge. The role of the Tribal Court under the Water Code is to enforce criminal penalties for violations. In light of a recent Supreme Court decision, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), it is doubtful that the Tribal Court has any criminal jurisdiction over the non-Indian plaintiffs or that any charges would be filed against them. No charges have been filed nor has prosecution been threatened. Thus, any action by the Tribal Court against the plaintiffs in the future is speculative, and interference by this Court is not warranted. *See Boyle v. Landry*, 401 U.S. 77 (1971).

In contrast, the controversy with the tribal officials is ripe for adjudication. The Water Code requires the plaintiffs to submit their water claims to the Tribal Council by the end of 1978 or to risk losing these claims. The Tribal Council officers will administer the

Water Code. The impact of the Code through the actions of these tribal officers is thus sufficiently immediate and direct to permit adjudication of plaintiffs' challenge. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 153 (1967).

Plaintiffs allege six separate claims for relief and state a basis for federal jurisdiction over each claim.

The first claim is that a correct interpretation of the Treaty with the Yakimas, 12 Stat. 951, will establish that the Yakimas have no authority to regulate or affect plaintiffs' rights to water. Plaintiffs allege jurisdiction under 28 U.S.C. §1331 (federal question) for this claim.

Second, plaintiffs claim that the Code is void because it was adopted without authority, as federal statutes reserve such authority to the United States. These statutes include 25 U.S.C. §§ 2, 9, 70u and 381. Plaintiffs assert that 28 U.S.C. §1331 also provides for jurisdiction over this claim.

Third, plaintiffs allege that the Water Code deprives plaintiffs of the full and equal benefit of the laws of the State of Washington concerning real property and therefore violates 42 U.S.C. §§1981 and 1982. Plaintiffs allege jurisdiction under 28 U.S.C. §§1343(4) and 1331.

Fourth, plaintiffs allege a taking of property in violation of the Fifth Amendment to the United States Constitution and of 25 U.S.C. §1302 (Indian Civil

Rights Act), resulting in federal jurisdiction under 28 U.S.C. §1331.

Fifth, plaintiffs allege that provisions of the Code discriminate against them on the basis of race in violation of 25 U.S.C. §1302 (ICRA) and 42 U.S.C. §§1981 and 1982, creating federal jurisdiction under 28 U.S.C. §1343(4).

Sixth, plaintiffs argue that the United States Constitution generally, and specifically in the Tenth Amendment, protects the plaintiffs from the exercise of governmental authority by non-federal and non-state entities including the tribe. Plaintiffs allege federal jurisdiction under 28 U.S.C. §1331.

Plaintiffs also allege that 22 U.S.C. §2201 confers jurisdiction to grant declaratory relief.

This Court has federal question jurisdiction over claims "wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. §1331. The first claim of the plaintiffs, that the tribal officials' regulation is void under the Treaty with the Yakimas, 12 Stat. 951, arises under federal law and this Court has jurisdiction over it under §1331. The second claim, that the regulation is void under statutes reserving such authority to the United States, also arises under federal law.

Defendants contend that this Court lacks federal

question jurisdiction over these claims concerning the treaty and the federal statutes because of the "well pleaded complaint" rule. *See Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 676 (1974), reaffirming the rule stated in *Taylor v. Anderson*, 234 U.S. 74 (1914). Defendants assert that plaintiffs are alleging rights to water based on state law, and that the allegations concerning the treaty and federal statutes are in anticipation of a defense and therefore cannot be relied upon to establish federal jurisdiction.

This action, however, is not based on state law. This is not an action to quiet title to water or an action in ejectment. The action challenges the very basis of the Yakima Tribe's claimed jurisdiction over all waters within the Yakima reservation. The extent of tribal jurisdiction is governed both by the federal treaty with the tribe and in addition, because Congress retains plenary power over Indians, by subsequent federal statutes affecting the tribe. The federal law thus is an integral part of the complaint and not merely of the defense, and the well pleaded complaint rule does not bar jurisdiction. The action arises under federal law, both treaty and statute, because the right asserted "will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another." *Gully v. First National Bank*, 299 U.S. 109, 112 (1936).

The Court also holds that the amount in contro-

versy requirement is satisfied. The standard for determining whether jurisdictional amount exists is stated in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1938).

> It must appear to be a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.

In suits for injunctions or declaratory relief, the value of the amount in controversy is the value of the object of the suit. *See Mississippi & M. R. Co. v. Ward*, 67 U.S. 485 (1892). *See generally*, 1 Moore's Federal Practice § 0.96. Here the object is protection of plaintiffs' alleged rights to water against allegedly unlawful regulation by the defendants. The appropriate measure of this value is the value of this water. Each plaintiff alleges that his or her land is valued at over $10,000; that this land is virtually valueless without water rights; and that their water rights are affected and possibly extinguished by the Water Code. These allegations are sufficient to establish the jurisdictional amount. This conclusion is not altered by *Quinault Tribe of Indians v. Gallagher*, 368 F.2d 648 (9th Cir. 1966). There the funds asserted to provide the jurisdictional amount were not the object of the suit but were a hoped-for collateral effect of the litigation. It is well established that such collateral effects cannot form the basis for jurisdictional amount.

The defendants further argue that plaintiffs must exhaust their tribal remedies before any action can

be maintained in federal court. This Court holds that no exhaustion is required as to the claim that the tribe lacks jurisdiction over plaintiffs' waters.

The general rule is that exhaustion requirements apply to administrative remedies, and not to judicial ones. *See McNeese v. Board of Ed. for Community Unit School Dis. 187*, 373 U.S. 668 (1963). Thus, even if plaintiffs have a remedy in tribal court under the Indian Civil Rights Act, the availability of that remedy does not bar assertion in federal court of separate federal remedies.

Under the Tribal Water Code plaintiffs may submit their claims to the Water Board and may appeal any decision of the Board to the Tribal Council. Defendants argue that the plaintiff should exhaust these administrative remedies prior to suing in federal court. However, plaintiffs argue that these tribal agencies lack jurisdiction over their claims. There is no indication that these administrative bodies have the power to entertain the claim that under federal law tribal agencies have no power to affect plaintiffs' water rights. Tribal agencies, in contrast to federal courts, have no special expertise in interpreting federal treaties and statutes; thus there is no policy basis for deferral to tribal agencies' determinations of these issues. For all these reasons, exhaustion of tribal administrative remedies is not required here. *See Public Utilities Commission of Cal. v. United States*, 355 U.S. 534

(1958); *McKart v. United States*, 395 U.S. 185 (1969).

Thus, the Court has concluded that it has jurisdiction over the issue of whether, under federal law, the tribe has jurisdiction over the plaintiffs' waters. Given this holding, the Court at this time need not determine whether it has jurisdiction over the other claims, or whether they must be dismissed for failure to state a claim upon which relief can be granted. If the Court finds that the tribe has no jurisdiction over these waters, the other claims are moot. On the other hand, if the Court finds that the tribe does have jurisdiction over these waters, defendants may renew their motion to dismiss. The Court will determine at that time whether tribal power is limited by these other laws. In the meantime the Motion to Dismiss these other claims is DENIED without prejudice to its renewal after determination of the issue of the tribe's jurisdiction.

Defendants' Motion to Dismiss is DENIED.

DONE BY THE Court this 31st day of January, 1979.

MARSHALL A. NEILL
United States District Judge

APPENDIX E

TREATY WITH THE YAKIMAS, 1855

12 Stat. 951, June 9, 1855—Treaty

Preamble

Articles of agreement and convention made and concluded at the treaty ground, Camp Stevens, Walla-Walla Valley, this ninth day of June, in the year one thousand eight hundred and fifty-five, by and between Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the undersigned head chief, chiefs, headmen and delegates of the Yakama, Palouse, Pisquose, Wenatchapam, Klikatat, Klinquit, Kow-was-say-ee, Li-ay-was, Skinpah, Wish-ham, Shyiks, Oche-chotes, Kah-milt-pah, and Se-ap-cat, confederated tribes and bands of Indians, occuping lands hereinafter bounded and described and lying in Washington Territory, who for the purposes of this treaty are to be considered as one nation, under the name of "Yakama," with Kamaiakun as its head chief, on behalf of and acting for said tribes and bands, and being duly authorized thereto by them.

. . . .

ARTICLE II. There is, however, reserved from the lands above ceded for the use and occupation of the aforesaid confederated tribes and bands of Indians, the tract of land included within the following boundaries, to wit:

[Description of Yakima Indian Reservation]

. . . .

All of which tract shall be set apart, and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the Superintendent and agent. And the said confederated tribes and bands agree to remove to, and settle upon, the same within one year after the ratification of this treaty. In the meantime it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States; and upon any ground claimed or occupied, if with the permission of the owner or claimant.

Guaranteeing, however, the right to all citizens of the United States, to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named.

And provided, That any substantial improvements heretofore made by any Indian, such as fields enclosed and cultivated, and houses erected upon the lands hereby ceded, and which he may be compelled to abandon in consequence of this treaty, shall be valued, under the direction of the President of the United States, and

payment made therefor in money; or improvements of an equal value made for said Indian upon the reservation. And no Indian will be required to abandon the improvements aforesaid, now occupied by him, until their value in money, or improvements of an equal value shall be furnished him as aforesaid.

APPENDIX F

25 U.S.C. § 1302. Constitutional rights

No Indian tribe in exercising powers of self-government shall—

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines,

inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

(Apr. 11, 1968, P. L. 90-284, Title II, § 202, 82 Stat. 77.)

25 U.S.C. § 1303. Habeas corpus

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

(Apr. 11, 1968, P. L. 90-284, Title II, § 203, 82 Stat. 78.)

APPENDIX G

28 U.S.C. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treates of the United States.

(June 25, 1948, ch 646 § 1, 62 Stat. 930; July 25, 1958, P. L. 85-554, § 1, 72 Stat. 415; Oct. 21, 1976, P. L. 94-574, § 2, 90 Stat. 2721; Dec. 1, 1980, P. L. 96-486, § 2(a), 94 Stat. 2369.)

28 U.S.C. § 1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42 [42 USCS § 1985];

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(June 25, 1948, c. 646 § 1, 62 Stat. 932; Sept. 3, 1954, c. 1263, § 42, 68 Stat. 1241; Sept. 9, 1957, P. L. 85-315, Part III, § 121, 71 Stat. 637.)

28 U.S.C. § 2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 [26 USCS § 7428], any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(June 25, 1948, c. 646, § 1, 62 Stat. 964; May 24, 1949, c. 139, § 111, 63 Stat. 105; Aug. 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, P. L. 85-508, § 12(p), 72 Stat. 349; Oct. 4, 1976, P. L. 94-455, Title XIII, § 1306(b)(8), 90 Stat. 1719.)

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
NO. C-78-02

FRED HOLLY, et ux., et al.

Plaintiff,

v.

WATSON TOTUS, et al.,

Defendants,

STATEMENT PERTAINING TO MOTION FOR SUMMARY JUDGMENT OF THE STATE OF WASHINGTON, DATED MAY 28, 1982.

Pursuant to Local Rule 13 of the Court and for the sole purpose of consideration of the motion for partial Summary Judgment of the State of Washington and the other plaintiffs, dated May 28, 1982, and for no other purpose whatever the parties to this proceeding agree to the following statement of facts:

1. The Yakima Indian Reservation was established and reserved by treaty with the United States in 1855 (12 Stat. 951).

2. The Confederated Tribes and Bands of the Yakima Indian Nation, herein called the "Yakima Indian Nation," has been recognized as an Indian tribe by the Secretary of the Interior. The Yakima Tribal Council is the governing body of said tribe and is so recognized by the Secretary of the Interior.

3. The individual defendants are elected and duly qualified and acting members of the Yakima Tribal

Council. As members of the Yakima Tribal Council, they collectively prepared, promulgated, and made effective the Yakima Nation Water Code. Resolution No. T-79-77. (A copy thereof is set forth in Exhibit A.) This code applies to all areas within the Yakima Indian Reservation. The scope of coverage of the Code as intended by the Yakima Indian Nation includes the Glenwood area.

4. The Glenwood area is an area of 100,457 acres located in the south-central part of the State of Washington and immediately southeast of Mount Adams. Beginning in the 1880s, it was substantially and predominantly settled by non-Indians. Patents were issued to these settlers by the United States in the late 19th or early 20th century under the federal homestead laws on the assumption that the land in this area was part of the public domain. In 1947 the Yakima Tribe filed a claim with the Indian Claims Commission of the United States demanding compensation for these and other lands on the ground that there had been a taking under the power of eminent domain or a violation of the 5th Amendment to the United States Constitution. Petition filed June 21, 1949. *The Yakima Tribe* v. *U.S.*, Indian Claims Commission Docket No. 47. It was asserted that these lands were part of the Yakima Indian Reservation, that patents had been issued and the lands otherwise disposed of inadvertently and that the assumption that the lands were part of

the public domain was erroneous. *id.* The claim was upheld as to a 121,466 acre tract. (Identified as Tract D in the Indian Claims Commission proceedings.) 16 Ind. Cl. Cmsn. 426. A 21,009 acre portion of that tract was severed into a separate claim. The remainder of the tract is what is identified here as the Glenwood area. It was agreed by the Tribe and the United States that vacant and unpatented lands in the Glenwood area, containing some 2,548 acres, were to be returned to the tribe. These lands were eliminated from the money portion of the claim. The claim for money judgment was agreed to apply to the remaining 97,909 acres which had been patented. 20 ICC 76, 77, 78, 79. The United States was found liable on the claim for the patented acres. The Yakima Tribe received a judgment for this and other claims in a consolidated judgment. 20 ICC 90, 95, 96. None of the plaintiffs were parties to the proceedings before the Indian Claims Commission.

5. The Yakima Indian Reservation, exclusive of the Glenwood area, contains 1,223,844 acres. This land is held as follows:

Tribal land and alotted land held in trust by the United States	1,121,220 acres
Fee land held by Indians	3,202 acres
Fee land held by non-Indians	99,422 acres
TOTAL	1,223,844 acres

For the most part the fee lands held by non-Indians

were transferred to non-Indians pursuant to the Federal Allotment Acts. The land ownership of the Yakima Indian Reservation is set forth on Exhibit B, a map of the Yakima Indian Reservation prepared by the Bureau of Indian Affiars.

6. The non-governmental plaintiffs are non-Indian citizens of the State of Washington. They claim ownership of the land and are users of water in the Glenwood area.

7. Plaintiff State of Washington is a state of the United States, admitted to the Federal Union in 1889. It (through various state departments) claims ownership of land and water rights and is a user of water in the area which the Yakima Nation claims is within the purview of the Yakima Nation Water Code. The State of Washington, through the Department of Ecology, administers the state's water right laws.

8. In relation to the use of water within the Glenwood area, several individual plaintiffs hold permits or certificates issued by the State of Washington pursuant to Chapter 90.03 RCW or otherwise claim the right to use waters within the Glenwood area based on state law. Several individual plaintiffs also claim rights to use the water within the Glenwood area pursuant to decree of the Klickitat County Superior Court issued in accordance with the general adjudication procedures of Chapters 90.03 or 90.44 RCW or rights established otherwise under state law. *In the Matter of the Deter-*

mination of the Rights to the Use of the Waters of Bird and Fraser Creeks. State v. *Bartholomew, et al.* Klickitat County Washington Superior Court Decree entered March 14, 1921. Exhibit C. For more than 50 years waters have been allocated in accordance with this decree.

9. The Yakima Indian Nation and its members have reserved treaty water rights to the use of waters within the exterior boundaries of the Yakima Indian Reservation. See *Winters* v. *United States*, 207 U.S. 564 (1908).

10. The Yakima Indian Nation has promulgated that all of the waters that underlie, arise upon or flow through or along the border of the Yakima Indian Reservation are reserved for the beneficial use of its members as needed. At the present time, however, parts of those waters are used both within and outside the boundaries of the Reservation by non-Indians.

11. The United States Department of the Interior has neither approved the Yakima Water Code nor, at any time, adopted any comprehensive code or regulation purporting to allocate or regulate waters within the reservation. The Yakima Indian Nation has been advised that the Yakima Nation Water Code will not be approved by the Department of the Interior until regulations are adopted by it pursuant to 25 USC Sec. 381. Since enactment of 25 USC Sec. 381 by Congress

in 1887, the Department of the Interior has failed to adopt such regulations.

12. Enforcement of the Yakima Nation Water Code has been stayed since the inception of this case. The Yakima Nation Water Code has not, at any time, before the commencement of this suit or thereafter, been enforced by the Yakima Indian Nation against any of the plaintiff.

DATED this 28th day of May, 1982.

ss._____
DONALD H. BOND
Attorney for non-State
Plaintiffs

ss._____
CHARLES B. ROE, JR.
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Supreme Court, U.S.
FILED
JUL 31 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-1912

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1986

WATSON TOTUS, et al.,

Petitioners,

vs.

FRED HOLLY, et ux, et al.,

Respondents.

BRIEF OF MUNICIPAL AND INDIVIDUAL RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Court of Appeals was correct in applying the doctrine of *Ex Parte Young* and *Larson v. Domestic & Foreign Commerce Corporation* (which was applied by this Court to Indian tribal officials in *Santa Clara Pueblo v. Martinez*) to hold that the United States District Court had jurisdiction over Indian tribal officials in their individual capacty where the authority under which they acted was void.

2. Whether the Court of Appeals correctly held, after years of litigation, that it was futile to require respondent Water Users to exhaust tribal remedies when there were no tribal, civil or criminal proceedings pending, where the tribal remedies were controlled and subject to final determination by a Tribal Council which in promulgating the ordinance in question had already resolved the question of respondents' water rights adversely to respondents, and where the subject matter of the Water Code has, at least in part, been pre-empted by Congress.

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2. The Court of Appeals correctly held, after years of protracted litigation, that it was futile to require respondent Water Users to exhaust tribal remedies when there were no tribal, civil or criminal proceedings pending, where any tribal remedies which might have been sought were controlled by and subject to final determination by a Tribal Council which, in promulgating the Water Code, had already resolved the question of ownership by respondent Water Users of water rights on the reservation adversely to Water Users, and where the subject matter of the Water Code has been, at least in part, pre-empted by Congress 21

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ADDITIONAL TREATIES AND STATUTES

Pertinent portions of additional statutes cited are reprinted in Appendix at Page A-1 hereto.

COUNTERSTATEMENT OF THE CASE

The centerpiece and focus of this litigation are the terms of Yakima Nation Water Code (the "Water Code") which was promulgated as Resolution No. 7-79-77 by the Yakima Tribal Council in May 1977 and became effective in 1978. A copy has been included in Appendix A to the Brief of Respondent State of

Washington in Opposition to Petition for Writ of Certiorari.

The Code purports to establish, by self-executing declarations of ownership and forfeitures, tribal communal ownership of rights to the use of all water on the reservation and to allocate rights to use of water on the basis of tribal discretion and racially discriminatory criteria without regard to the ownership of such rights by Indian or non-Indians. Adoption of the Code immediately clouded title to the water rights of land held by the individual and municipal respondents (who are non-Indian Water Users on the Yakima Indian Reservation or in the Glenwood Area, and are identified herein as "Water Users").

LEGAL PROCEEDINGS. This action for injunctive and declaratory relief was started in January 1978. The defendants moved immediately to dismiss on a number of grounds. (E.R.[1] 1, 3; C.R.[2] 22, 29) Before the District Court could rule, this Court issued its opinion in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). The Water Users then amended their complaints to include as defendants, tribal officials in their individual capacities acting under void authority. (E.R. 42, 46, 48; C.R. 22, 29) The District Court ruled it lacked jurisdiction over the Tribe, the

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[1] "E.R." refers to the Excerpts of Record in the Court of Appeals.

[2] "C.R." refers to the Clerk's Record in the District Court.

Tribal Council and tribal officials in their official capacity by virtue of the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. § § 1301-1303, or any other statute. The District Court, nevertheless, held that suit against officials in their individual capacities was not barred by sovereign immunity. Petitioners' Appendix (herein "P. App.") D pp. 25a-32a.

The District Court also held then that the case was ripe for adjudication in that the actions of the tribal officials were sufficiently immediate and direct to permit adjudication, citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 153 (1967). P. App. D, p. 27a. The Tribal Council members have not continued to challenge that ruling.

In December 1978, before the effective date of the Water Code, Water Users sought and obtained injunctive relief against the application of the Water Code. (E.R. 93; C.R. 43, 47) That relief has been in effect almost continuously since then. P. App. H, p. 45a. (C.R. 54, 56, 86)

Later, the District Court granted the Water Users' motions for summary judgment on the ground that the Code was void. (E.R. 507; C.R. 34) It also ruled in favor of the Water Users on Tribal Council Members' contentions as to immunity and exhaustion of remedies. *Id.* On October 22, 1984, the Court of Appeals upheld the District Court Judge as to immunity and exhaustion of remedy, but reversed the District

Court's ruling that the Code was invalid because of its criminal sanctions. P. App. B, pp. 8a-11a.

On remand, the District Court again held that the authority under which the Tribal officials acted was void, but on the rationale that the Tribe did not have jurisdiction to regulate use of water over and above treaty reserved waters used by the Tribe and its members. P. App. C, pp. 12a-23a.

Tribal Council Members again appealed. The Court of Appeals on March 3, 1987, affirmed on the ground that the Tribal Council did not have the power to regulate excess water use by non-Indians on non-Indian fee land and that the Code was invalid to the extent it purported to bestow tribal civil regulatory authority over that use of excess waters. P. App. A, pp. 6a-7a.

This case has been pending before the Federal Courts over nine years. Throughout that entire period the Water Users' water rights have been clouded by the Water Code. At no time has the position of the Tribal Council Members as to all inclusive, exclusive Tribal ownership of all rights to use of all water on the reservation been changed by amendment of the Water Code or in any other substantial way. At no time have there been any proceedings pending before any tribal authority involving Water Users and the Water Code.

THE RESERVATION. The geographic and demo-

graphic setting in which the Water Code is to apply must be considered to understand the issues in this case.

The Yakima Indian Reservation is situated in the arid, eastern part of the State of Washington. Irrigation is required for the successful production of crops. The right to use of water is the principal component of value of land so irrigated.

The reservation has an area of 1,223,844 acres (about 1,900 square miles), exclusive of the Glenwood area. The Yakima River forms the northeastern boundary of the reservation. Some tributaries of the Yakima River border or rise in the reservation. Approximately two-thirds of the reservation is in the Yakima River Basin and one-third in the Klickitat River Basin. Ex. B to Statement. P. App. p. 43a. (E.R. 234, 236; C.R. 108)

YAKIMA RIVER BASIN. The Yakima Basin encompasses 6,062 square miles and includes approximately 475,000 irrigated acres. Waters for the irrigation of the basin come from the Yakima River and its tributaries. The natural flow of the basin has been enhanced by the Yakima Project developed by the United States Bureau of Reclamation, including large reservoirs located far from the reservation in the Cascade Mountains. The project distributes water throughout the basin to hundreds of thousands of acres including about 143,000 acres on the reservation. (E.R. 242; C.R. 111)

Six hundred thousand acre feet of water are diverted annually from the Yakima River to the reservation pursuant to Acts of Congress (August 1, 1914, Section 22, 63rd Congress, 2nd Sess., 38 Stat. 604, and July 1, 1940, 76th Congress, 3rd Sess., Ch. 496, 54 Stat. 707) and contract with the Bureau of Reclamation. These waters are distributed on the reservation by the Wapato Project (administered by the Bureau of Indian Affairs) to 80,124 acres held in trust for Indians and 63,371 acres held by non-Indians. (E.R. 242)

Ahtanum Creek, which forms the north boundary of the reservation and is in the Yakima River Basin, provides water to both Indians and non-Indians on the reservation and to non-Indians off the reservation. Both federal reserved rights and state law water rights are served. *United States v. Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956); *United States v. Ahtanum Irrigation District*, 330 F.2d 897 (9th Cir. 1964).

The surface waters of the Yakima River Basin are presently being adjudicated pursuant to the McCarran Amendment, 43 U.S.C. § 666, 66 Stat. 560, in a Washington State Court general water adjudication. *State of Washington, Department of Ecology v. Acquavella*, 100 Wn.2d 651, 674 P.2d 160 (1983). The United States has been joined as defendant in those proceedings in its own right and as trustee for the Tribe. *See*

Arizona v. California, 460 U.S. 605 (1983); *Nevada v. U.S.*, 463 U.S. 110 (1983), *reh'g denied*, 464 U.S. 875; *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983).

THE KLICKITAT RIVER BASIN. About one-third of the reservation and the Glenwood area are in the Klickitat River Basin. The waters of this basin flow southerly to lands which are not claimed by the Tribe as part of the reservation and then into the Columbia River. Ex B to Statement. P. App. H, p. 43a. (E.R. 236)

NON-INDIAN OWNERSHIP OF RESERVATION LAND. Ownership of land in the irrigated portions of the reservation in the Yakima River Basin is a "checkerboard" of Indian and non-Indian ownership. *See Washington v. Yakima Indian Nation*, 439 U.S. 463 (1979). Ownership in the Glenwood area is predominantly non-Indian. *Id.* The 1,223,844 acre Yakima Indian Reservation (exclusive of the Glenwood area) includes 99,422 acres held in fee by non-Indians. For the most part the fee lands now held by non-Indians were transferred pursuant to the General Allotment Act, 25 U.S.C. § § 331 *et seq.*, 24 Stat. 388. P. App. H, pp. 42a, 43a.

Although the individual Water Users have asserted that the Glenwood area is not a part of the reservation, for the purposes of Water Users' motions for summary judgment only and no other purpose, it has been

assumed (without admitting the fact to be so) that the Glenwood area is a part of the reservation. The Water Code is asserted by petitioners (herein referred to as "Tribal Council Members") to apply equally to the reservation and the Glenwood area.

The Glenwood area was predominantly settled by non-Indians who received patents in the late 19th or early 20th Century under the Federal Homestead Laws on the assumption that the land was part of the public domain. P. App. H, pp. 41a-42a. The United States also granted 48,194 acres of land in this area in trust to the State of Washington. Act of February 28, 1889, 25 Stat. 676. (E.R. 288; C.R. 117) Subsequently, in the mid-20th Century, it was contended by the United States that this area is part of the reservation.

A PREDOMINANTLY NON-INDIAN POPULATION. The population of the reservation and the Glenwood area in 1980 was predominantly non-Indian. It totaled 25,363 of whom only 20% were Indian. In Toppenish, Wapato and the Glenwood area the population was approximately 10% Indian and 90% others. (E.R. 458-460; C.R. 129)

NON-INDIAN USE OF EXCESS WATERS. Water underlying, arising upon or flowing through or along the border of the reservation are being used by non-Indians both inside and outside of the reservation. P. App. H, p. 44a. On the reservation such use includes use by the State of Washington and by individual

non-Indians in the Glenwood area pursuant to claims under state law, permits granted by state law or certificates issued under State Court decrees. (E.R. 236; C.R. 108) The predominant use in the Glenwood area is by non-Indian Water Users. (E.R. 238-241, 244, 245; C.R. 109, 110, 112)

Waters in excess of those needed to satisfy tribal reserved water rights are available in both the Yakima and Klickitat River Basins. (E.R. 284-287; C.R. 116)

THE WATER CODE. Most significant for present purposes are four things which the Water Code expressly provides:

1. Tribal Onwership of All Rights to Use of Waters. It declares ownership by the Tribe of the rights and the use of all waters arising on, bordering, traversing or underlying the Yakima Indian Reservation. Code Preamble; Arts. I and III(6); pp. 1, 6, 7-8, 11; State Appendix A pp. 1, 4, 5, 6.

2. Filing Required to Save Any Claim to Use of Water. It requires all persons seeking to use water on the reservation to apply to the chairman of the Tribal Council, or lose the use of any claim for any right to use the water. Code Arts. IV, VIII, pp. 12, 15; State Appendix A pp. 8, 11.

3. Temporary Use of Water Permitted. It requires a permit (good for not more than ten years) for use of water within the reservation and prohibits use of water without such a permit. Arts. XIV(10), XV,

pp. 23, 24; State Appendix A pp. 18, 19. The permit is to be issued by the Water Resources Board appointed by the Yakima Nation Tribal Council. Arts. XIII, p. 19. State Appendix A p. 15. The Water Board must adhere to the policies set forth in the Code. Arts. II, XIV(4)(8), pp. 8, 9, 20-21, 22-23; State Appendix A pp. 5, 16, 18.

4. Priorities to Use of Water Rest in the Discretion of the Tribal Council and are Racially Discriminatory. It establishes a racially oriented system of priorities for the issuing of permits and use of water. No priority is allowed for the use of water by non-Indians on land that was not originally allotted to Indians. Arts. II, XIV, pp. 8-9, 20-22; State Appendix A pp. 5, 6, 16, 17. The highest priorities are for "tribal" or "public" uses and "tribal enterprise" established from time to time by resolution of the Tribal Council. Art. XIV(4)A,B, p. 21; State Appendix A p. 16. New priorities created by the Tribal Council may override priorities established by the Code or other Tribal Council action. Art. XIV(6), p. 22; State Appendix A p. 18.

CONTINUING INVOLVEMENT OF THE OFFICIALS OF THE TRIBAL COUNCIL. The chairman and other members of the Tribal Council continue to be involved after promulgation of the Water Code. Claims are to be filed with and acknowledged by its chairman. Art. IV, VII, pp. 12, 14-15; State Appendix A pp. 8,

10. The council may require more information from applicants and create new priorities at any time. Art. V, IX, XIV(6), pp. 13, 16, 22; State Appendix A pp. 8, 9, 11, 12, 18. It hears all appeals from decisions of the Water Resources Board. Its decision is final and unappealable. Art. XVII, pp. 24, 25; State Appendix A p. 20.

SUMMARY OF ARGUMENT

1. The Court of Appeals applied the settled rules of *Ex Parte Young*, and *Larson v. Domestic & Foreign Commerce Corporation*, in the light of *Santa Clara Pueblo v. Martinez* to Yakima Indian Tribal officials in their individual capacities where the authority under which they acted was void. The decision of the Court of Appeals does not conflict with decisions of other circuits or the settled decisions of this Court.

The Water Code is invalid as to rights to use of water on lands acquired under federal public land law, as to rights to use of water on allotted lands (whether held by Indian allottees, Indian patentees of allotted lands or their non-Indian successors), and as to rights to non-Indian use of surface waters being adjudicated in the Yakima River Basin.

State law governs water rights on former public domain lands. Allotted lands patented to Indians or non-Indians have, by Act of Congress, become state law lands. Even Indian allottees residing on the reservation are by statute entitled to federal protection

of their rights to use their proportionate share of treaty reserved waters.

Tribal regulation of water rights subject to adjudication and administration in a pending Washington State Court general adjudication has been pre-empted by the McCarran Amendment. 43 U.S.C. § 666.

2. The Court of Appeals correctly held, after years of litigation, that it was futile to require respondent Water Users to exhaust tribal remedies when there were no tribal, civil or criminal proceedings pending, where any tribal remedies which might have been sought were controlled by and subject to final determination by a Tribal Council which, in promulgating the Water Code, had already resolved the question of ownership by respondent Water Users of water rights on the reservation adversely to Water Users, and where the subject matter of the Water Code has, at least in part, been pre-empted by Congress.

Ample authority may be found in the Acts of Congress and decisions of this Court to support the holding of the Court of Appeals as to the issue of abstention or exhastion of tribal remedies based upon recognized notions of equity and comity.

A. Where there were no pending Tribal Court or other proceedings, then the Federal District Court had a duty to hear this matter.

B. The Tribal Council has already resolved the issue of ownership by respondent Water Users of

rights to use of water on the reservation adversely to Water Users. It would be futile and improper to require Water Users to exhaust tribal remedies to reach a preordained conclusion.

C. The Water Code improperly attempts to regulate water rights which by Act of Congress have been committed to regulation by the State, or in the State Courts or, in some cases, by the federal government.

D. This case should not be sent back for further proceedings designed to exhaust tribal remedies, but which in reality would serve only to further protract this already unduly protracted litigation.

ARGUMENT

1. The Court of Appeals applied the well-established doctrine of the cases of *Ex Parte Young*, and *Larson v. Domestic & Foreign Commerce Corporation*, to Yakima Indian Tribal officials in their individual capacities where the authority under which they acted was void. It did so correctly under the recent decision of this Court in *Santa Clara Pueblo v. Martinez*.

A. The doctrine of *Young* and *Larson* applies to provide Federal Court jurisdiction over tribal officials in their individual capacities despite tribal immunity.

The doctrine of *Ex Parte Young*, 209 U.S. 123 (1908) has been described as one of the three most important decisions of this Court. 17 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4231 (1978) at 352. Although it involves a fiction, the rule

of the case brings actions of state officials which might otherwise escape within the scope of federal judicial review. It subjects the states to constitutional restrictions which they might otherwise be able safely to ignore. *Id.* at 356, 357, 359. In perspective, the doctrine of that case seems indispensable to the establishment of constitutional government and the rule of law. *Id.* at 360. Basically, the doctrine permits the Federal Courts, notwithstanding the Eleventh Amendment, to enjoin state officers from acting unconstitutionally, either because their action violates the Constitution directly or is contrary to a federal statute that is the supreme law of the land. *Id.* § 4232 at 360.

Similarly, the rule of *Larson v. Domestic & Foreign Commerce Corporation*, 337 U.S. 682 (1949), permits suits for specific relief against officers of the federal government acting outside the scope of their statutory authority or in an individual capacity. *See* 14 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3655 (2d ed. 1985) at 225. Furthermore, under the rule of *Larson*, sovereign immunity of the United States does not bar action against federal officers who have acted in their individual capacity, outside the scope of their authority, unconstitutionally or under unconstitutional authority. *Id.* § 3655 at 225-230.

In its recent decision of *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978) this Court recognized that the rule of *Ex Parte Young, supra*, required

consideration, separate from the immunity of the *Pueblo*, of the liability of a Pueblo officer to declaratory and injunctive relief.

The liability of tribal officials, like officials of the state and federal governments, in their individual capacity for actions without authority is well-settled in both reason and precedent.

B. Petitioner tribal officials' authority to act is based upon the Water Code which is void within the meaning of the *Young*, *Larson* and *Martinez* cases.

(1) The Water Code is invalid as to rights to use of water on lands acquired under federal public land law.

The statutory limitations on tribal power pertinent to the Court of Appeals decision arise out of acts adopted by Congress in the late 19th Century intended to further the national policy of the settlement of the arid west and fulfillment of the "manifest destiny" of the United States to stretch from sea to sea. These Acts were designed to provide incentives, generally in the form of land, for individuals to relocate and carve civilized communities out of the desert wilderness.

It is now well-settled that water rights for lands in the arid western states patented under the federal homestead laws are acquired and held under state law. Desert Land Act of 1877, 43 U.S.C. § § 321-323, 19 Stat. 377; *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935). These

non-navigable waters became subject to the *plenary* control of the desert land states. 295 U.S. at 163. "*The public interest in such state control in the arid land states is definite and substantial.*" 295 U.S. 142 at 165. *See also Cappaert v. United States*, 426 U.S. 128, 145 (1976).

Homesteaders and their successors (such as the Glenwood Water Users) have been held to have only Washington state law water rights. *United States v. Anderson*, 736 F.2d 1358, 1362, 1363 (9th Cir. 1984). Those rights are unquestionably appurtenant to the land where the water is beneficially used, pass upon conveyance to the grantee and are real property under Washington state law. Section 90.03.380 of Revised Code of Washington; *Drake v. Smith*, 54 Wn.2d 57, 61, 337 P.2d 1059 (1959); *Lawrence v. Southard*, 192 *Wash.* 287, 73 P.2d 722 (1937); *Madison v. McNeal*, 171 Wash. 669, 19 P.2d 97 (1933); *Tedford v. Wenatchee Reclamation District*, 127 Wash. 495, 221 Pac. 328 (1923).

The owners of these state law water rights are entitled to federal protection under 43 U.S.C. § 661.

Treaty reserved water rights encompass only that quantity of water needed to accomplish the purposes of the reservation and no more. *Cappert v. United States*, 426 U.S. 128 (1976); *United States v. New Mexico*, 438 U.S. 696 (1978).

Years of peaceful use of water by non-Indians on

their own lands on the reservation establish the undeniable existence of excess waters which they have a right to use. The existence of treaty reserved water rights held by the Tribe or its members goes only to the priority, not the existence and ownership by non-Indians of state law water rights.

The Water Code, with its self-executing, communalization of all rights to use of water on the reservation, and its shifting and racially oriented priorities cannot stand against these vested state law water rights.

The Court of Appeals properly held that the Yakima Tribal Council lacked power to regulate the use of excess water by non-Indians on non-Indian fee land within the reservation and that the Water Code was invalid to the extent that it attempted to authorize such action.

(2) The Water Code is invalid as to rights to use of water on allotted lands whether held by Indian allottees or their non-Indian successors.

Although the decision of the Court of Appeals did not go so far, it is also clear that the Water Code is not valid as to rights to use of water on land held by Indian allottees, formerly allotted lands held by Indians in fee title or formerly allotted lands held by non-Indians in fee title (constituting the bulk of non-Indian ownership on the reservation).

Over the years Congress has vacillated between integration and separation in its policy toward Indians.

One result has been the checkerboard pattern of Indian and non-Indian population and ownership of irrigated land in the Yakima River Basin portion of the reservation noted in *Washington v. Yakima Indian Nation*, 439 U.S. 463 (1979). *See also Montana v. United States*, 450 U.S. 544 (1981). Non-Indians easily form the dominant ethnic group on the reservation. Substantial acreage on the reservation is owned by non-Indian successors to ownership of formerly allotted lands.

These patterns of population and ownership result from the General Allotment Act (also known as the Dawes Act), 25 U.S.C. § § 331 *et seq.*, 24 Stat. 388, adopted by Congress in one of its early "integration" phases February 8, 1887. The Act authorized tribal lands to be allotted in designated quantities to individual Indians. 25 U.S.C. § 331. Title was to be held in trust for each individual Indian allottee for a specified period of time then conveyed to the Indian or his heirs in fee discharged of the trust. 25 U.S.C. § 348, 31 Stat. 1085 (1901). Under Section 6 of the Act, as amended in 1906, after a fee patent has been issued, the property rights involved are governed by state law. 25 U.S.C. § 349, 34 Stat. 182; *Larkin v. Paugh*, 276 U.S. 431 (1928); *South Carolina v. Catawaba Indian Tribe*, ____ U.S. ____, 106 S. Ct. 2039, 2045 n.19 (1986). The fee patent, however, carries with it, as an appurtenance, its proportionate share

of the implied treaty water rights of the Tribe and its members. *United States v. Anderson*, 736 F.2d 1358, 1362 (9th Cir. 1984); *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981) *cert. denied*, 454 U.S. 1092 (1981), *appeal on remand*, 752 F.2d 397 (9th Cir. 1985) *petition for reh'g denied*, 758 F.2d 1324 (9th Cir. 1985) *cert. denied*, ___ U.S. ___, 106 S. Ct. 1183 (1986); *U.S. v. Ahtanum Irrigation District*, 236 F.2d 321, 342 (9th Cir. 1956) *cert. denied*, 352 U.S. 988; *U.S. v. Powers*, 94 F.2d 783 (9th Cir. 1938).

Even before patent is issued to allotted land, there is to be a just and equal distribution of water rights among the Indians residing on the reservation. Section 7 of the General Allotment Act, 25 U.S.C. § 381, 24 Stat. 390. Resident Indians, as holders of title to land in the reservation, are not to be deprived of those rights. *U.S. v. Powers*, 94 F.2d 783 (9th Cir. 1938) *aff'd*, 305 U.S. 527 (1938).

(3) The Water Code is invalid as to rights to non-Indian use of surface water in the Yakima River Basin.

Congress has historically deferred to administration of water rights by the western states. In the exercise of its plenary powers over Indian affairs Congress has, in addition, recognized and authorized administration of federal reserved water rights, including Indian treaty reserved water rights, by the

state courts in general water adjudications. 43 U.S.C. § 666, 66 Stat. 560 (also known as the McCarran Amendment); *Colorado River Water Conservation District v. U.S.*, 424 U.S. 800 (1976); *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983). This reflects a long-standing federal policy favoring unitary adjudication and administration of western water rights in state general water adjudication proceedings. The McCarran Amendment has given state courts concurrent and favored jurisdiction to both adjudicate and administer such federal reserved water rights as part of a unitary system for adjudicating and administering all water rights.

In the Yakima Basin a state court general adjudication, in which the United States has been joined in its capacity as trustee for the Yakima Indian Reservation, has been underway since 1977. *State of Washington, Department of Ecology v. Acquavella*, Yakima County, Washington Superior Court Cause No. 77-2-01484-5. *See State of Washington, Department of Ecology v. Acquavella*, 100 Wn.2d 651, 674 P.2d 160 (1983).

Congressional policies now and historically, favor establishment and protection of state law water rights and state court adjudication and administration of federal reserved water rights. Where the waters are being so adjudicated and administered, and flow both on and off of the reservation with substantial

off-reservation impacts, it is clear that the regulation of such waters is not a matter properly identified within the scope of the tribal self-government. The power of the Yakima Nation to regulate water use by non-members, if not all water users, in the Yakima basin which is being adjudicated in state court general water adjudication proceedings pursuant to the McCarran Amendment has been pre-empted. *Rice v. Rehner*, 463 U.S. 713 (1983).

2. The Court of Appeals correctly held, after years of protracted litigation, that it was futile to require respondent Water Users to exhaust tribal remedies when there were no tribal, civil or criminal proceedings pending, where any tribal remedies which might have been sought were controlled by and subject to final determination by a Tribal Council which, in promulgating the Water Code, had already resolved the question of ownership by respondent Water Users of water rights on the reservation adversely to Water Users, and where the subject matter of the Water Code has been, at least in part, pre-empted by Congress.

A. Where there were no pending Tribal Court or other proceedings, then the Federal District Court had a duty to hear this matter. It was not premature for it to do so and abstention would have been improper.

Tribal Council Members suggest that, after almost ten years of litigation before the Federal Courts and without any tribal proceedings pending against Water

Users at any time, it is premature for the Federal Court to dispose of this matter. They suggest, in effect, that a rule of abstention be applied.

The Tribal Council Members rely upon two recent decisions of this Court: *National Farmers Union Insurance Company v. Crow Tribe*, 471 U.S. 845 (1985); *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. ____, 107 S. Ct. 971 (1987). These cases, respectively, involved assertion of federal question and diversity jurisdiction of the federal district courts. Each held that the District Court should have abstained from exercising its jurisdiction. In each, unlike the present case, the matter was already the subject of a pending Indian Tribal Court proceeding. In those cases considerations of comity were, predictably, held to direct that tribal remedies be exhausted in Tribal Court before the question was addressed by the Federal District Court.

The doctrine of abstention under which a District Court may decline to exercise or postpone the exercise of its jurisdiction is, however, an extraordinary and narrow exception to the duty of the federal district courts to adjudicate controversies properly before them. Abdication of the obligation to decide cases can be justified only in exceptional circumstances where the order to the parties to repair to the State Court would clearly serve an important countervailing interest. *County of Allegheny v. Frank Mashuda Com-*

pany, 360 U.S. 185, 196 (1959); *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964).

By clear analogy, the considerations of comity, tribal sovereignty and self-government invoked by Tribal Council Members bring into play the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971). When, as here, there is no pending tribal action, *Younger* principles and considerations of comity do not require exceptional circumstances to justify federal declaratory and injunctive relief against tribal statutes or ordinances. *Steffel v. Thompson*, 415 U.S. 452, 462 (1974); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 602 (1975); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930, 931 (1975).

B. The Tribal Council has already resolved the issue of ownership of their rights to use of water on the reservation adversely to Water Users. It would be futile and improper to require them to exhaust tribal remedies to a preordained conclusion.

In *National Farmers Union Insurance Company v. Crow Tribe*, 471 U.S. 845 (1985), this Court stated that it did not suggest that exhaustion would be required where it would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction. 105 S. Ct. at 2454, n.21. That is the case here.

At the heart of the Water User's contentions in this case is the attempt by the Tribe to usurp all rights to use of all waters on the reservation. The tribunal

of last resort for non-Indians seeking to challenge the Water Code is the Tribal Council. The Tribal Council has already at numerous places in the Water Code resolved the issue of ownership of rights to use of water in favor of an all-inclusive, communal tribal water right held and administered by it and made available for only temporary use according to a racially discriminatory set of priorities. The Water Board, which is the body designated to preside at initial hearings of matters under the Code, is bound to follow the principles established by the Tribal Council. Even the priorities set out in the Code by the Tribal Council are entirely subject to its discretion should it decide to recharacterize any use of water as a tribal or public use or a use for tribal enterprise. Water Code Art. XIV, A, B. Appendix A to State Brief p. 16. There is no appeal from the decisions of the Tribal Council. Although this litigation has dragged on for almost ten years, the Tribal Council has not revised the Code to change its position on ownership of the right to use of water even one iota.

It would be futile for the Water Users to pursue the question of the ownership of their water rights before either the Water Board or the Tribal Council. The Water Code, even if never interpreted by any Yakima Indian Tribunal other than the Tribal Council in adopting it, is not fairly subject to an interpretation which will render unnecessary or substantially modify

the federal question. It was the duty of the District Court to exercise its properly invoked jurisdiction. *City of Chicago v. Atchison, Topeka and Santa Fe Railway Co.*, 357 U.S. 77, 84 (1958); *Juidice v. Vail*, 430 U.S. 327, 339 (1977); *Gibson v. Berryhill*, 411 U.S. 564, 575-577 (1973); *Harman v. Forssenius*, 380 U.S. 528, 534, 535 (1965); *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964); *Zwickler v. Koota*, 389 U.S. 241, 247, 248, 251 (1967):

> Any other course would impose expense and long delay upon litigants without hope of its bearing fruit . . . abstention cannot be ordered simply to give state courts the first opporunity to vindicate the federal claim.

389 U.S. at 251.

C. The Water Code improperly attempts to regulate water rights which by Act of Congress have been committed to regulation in the State or Federal Courts.

In *National Farmers Union Insurance Company v. Crow Tribe*, 471 U.S. 845 (1985), this Court stated that it did not suggest that exhaustion would be required where the action was expressly violative of express jurisdictional prohibitions. 105 S. Ct. at 2454 n.21. In this case Congress has, in essence, pre-empted Tribal regulation of the use of water rights by the Water Users. It is inappropriate to require abstention or exhaustion of tribal remedies as to rights to use of water on lands owned by non-Indians and acquired from the public domain under federal laws such as the

homestead laws; as to rights to use of water on formerly allotted lands held in fee by Indians or non-Indians; as to rights of Indian allottees on the reservation to a just and equitable distribution of treaty reserved water rights; and as to rights to use of surface water which are subject to adjudication and administration in the pending State Court general adjudication. See Part 1.B(1)(2) and (3) of this argument, *supra* at p. 15.

D. This case should not be sent back for further proceedings designed to exhaust tribal remedies, but which in reality would serve only to further protract this already unduly protracted litigation.

This case has been before the Courts almost ten years. Tribal Council Members suggest that it should be started all over again. Presumably, the parties would face hearings before the Water Board, the Tribal Council, the Federal District Court, the United States Court of Appeals and, possibly, this Court before the question of their ownership of their water rights would be resolved. Throughout that time valuable rights to use of water and land values would remain clouded.

Parties should not be remitted to the state courts for further proceedings where the litigation has been protracted, remission would further protract the proceedings, valuable rights might be lost and it is unlikely that the outcome would change. *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964); *Harris County*

Commissioners Court v. Moore, 420 U.S. 77, 83, 84 (1975).

CONCLUSION

The decision of the Court of Appeals was correct. Application of the doctrine of the *Young*, *Larson* and *Martinez* cases to tribal officials acting without authority creates no conflicts with the decisions of this Court or other courts of appeal, and is as necessary and permissible as it is to state and federal officials.

Under Acts of Congress and decisions of this Court the self-executing application of the Water Code to the Water Users and others, clouding valuable property rights, was without authority and void. Relief against the Tribal Council Members was proper.

Neither the Court of Appeals nor the Federal District Court acted prematurely. Unlike the *National Farmers Union* and *LaPlante* cases relied upon by the Tribal Council Members, this case is not a proper case for abstention.

This case raises no important questions of federal law which should be settled by this Court at this time. There is no conflict with the decisions of this Court, nor other Court of Appeals, and no serious departure from the accepted and normal course of judicial proceedings.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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July 28, 1987

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APPENDIX

Federal Statutes

25 U.S.C. § 331, 24 Stat. 388 in pertinent part provides:

> **Allotments on reservations; irrigable and nonirrigable lands**
>
> In all cases where any tribe or band of Indians has been or shall be located upon any reservation created for their use by treaty stipulation, Act of Congress, or executive order, the President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed whenever in his opinion such reservation or any part may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian. And whenever it shall appear to the President that lands on any Indian reservation subject to allotment by authority of law have been or may be brought within any irrigation project, he may cause allotments of such irrigable lands to be made to the Indians entitled thereto in such areas as may be for their best interest, not to exceed, however, forty acres to any one Indian, and such irrigable land shall be held to be equal in quantity to twice the number of acres of nonirrigable agricultural land and four times the number of acres of nonirrigable grazing land: . . . .

25 U.S.C. § 348, 31 Stat. 1085 in pertinent part provides:

> **Patents to be held in trust; descent and partition**

Upon the approval of the allotments provided for in this Act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: . . . .

25 U.S.C. § 349, 34 Stat. 182 in pertinent part provides:

Patents in fee to allottees

At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348 of this title, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law: . . . *Provided further*, That until the issuance of fee-simple patents all allottees to whom trust patents shall be issued shall be subject to the exclusive jurisdiction of the United States: . . . .

25 U.S.C. § 381, 24 Stat. 390 in pertinent part provides:

Irrigation lands; regulation of use of water

In cases where the use of water for irrigation is necessary to render lands within any Indian

reservation available for agricultural purposes, the Secretary of the Interior is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.

43 U.S.C. § 321, 19 Stat. 377 in pertinent part provides:

> **Entry right generally; extent of right to appropriate waters**
>
> [T]he right to the use of water by the person so conducting the same, on or to any tract of desert land of three hundred and twenty acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights. . . . .

43 U.S.C. § 322, 19 Stat. 377 in pertinent part provides:

> **Desert lands defined; qustion how determined**
>
> All lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands, within the meaning of sections 321 to 323, 325, and 327 to 329 of this title, which fact shall be ascertained by proof of two or more credible

witnesses under oath, whose affidavits shall be filed in the land office in which said tract of land may be situated.

43 U.S.C. § 323, 19 Stat. 377 in pertinent part provides:

> **Application to certain States**
>
> Sections 321 to 323, 325 and 327 to 329 of this title shall only apply to and take effect in the States of California, Colorado, Oregon, Nevada, Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, and North and South Dakota.

43 U.S.C. 661, 14 Stat. 253, 16 Stat. 218, 90 Stat. 2793 in pertinent part provides:

> **Appropriation of water on public lands; rights of way for canals and ditches**
>
> Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; . . . .

43 U.S.C. § 666, 66 Stat. 560 in pertinent part provides:

> **Suits for adjudication of water rights**
>
> **(a) Joinder of United States as defendant; costs**
>
> Consent is hereby given to join the United States as defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring

water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

Washington Statutes

RCW 90.03.380 in pertinent part provides:

Right to water attached to land — Transfer or change in point of diversion. The right to the use of water which has been applied to a beneficial use in the state shall be and remain appurtenant to the land or place upon which the same is used.

Supreme Court, U.S.
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CLERK

(3)

No. 86-1912

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

WATSON TOTUS, et al.,

Petitioners,

v.

FRED HOLLY, et ux, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT STATE OF WASHINGTON IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the doctrine of exhaustion of remedies, as announced in *National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845 (1985) and *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S.___, 94 L.Ed.2d 10, 107 S. Ct. 971 (1987), restricts a federal district court from determining the validity of the actions of officials of an Indian tribe in adopting a water code when (a) there is no pending proceeding in a tribal forum involving the same parties and the same dispute, or (b) for reasons of "futility," the determination of the validity of the challenged code would be made by the same tribal entity that approved, by express provision of the tribal ordinance, the validity of the code.

2. Whether the immunity of an Indian tribe from suit will bar a suit in federal district court against tribal council members, as individuals, when they take actions that are beyond the powers of their office or implement those powers in an unconstitutional manner.

3. The following question is fairly included, within the meaning of Rule 21.1 of this Court, by question 2 of the Statement of Questions Presented in the Petition for a Writ of Certiorari (as rephrased by Respondent State of Washington in question 2, *supra*):[1]

> Whether the Yakima Indian Nation, as the beneficiary of usufructuary interests in water moving through the Yakima Indian Reservation under the "reserved rights" doctrine of *Winters v. United States*, 207 U. S. 564 (1908), is empowered to enact a comprehensive water rights allocation code that applies to *all* surface and ground waters within the Yakima Indian Reservation, including waters that (a) are *not* required to satisfy the exercise of tribal usufructuary water rights recognized under the *Winters* doctrine, and (b) are required to satisfy vested water rights,

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[1]A discussion of the rationale for the conclusion that this question is fairly included is contained on pages 10-12, *infra*.

held by non-Indian residents of the Reservation, established pursuant to either state or federal law?[2]

[2]For purposes of this brief, "non-Indian" means any person who is not an Indian, or who is an Indian *but* not a member of the Yakima Indian Nation.

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No. 86-1912

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The respondent, State of Washington, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Ninth Circuit's opinion in this case. However if the petition is granted, the Court is requested to set forth expressly as a question, to be briefed and argued by the parties and to be resolved by this Court, question 3 on page i hereof, on the basis that it is a question fairly included in the questions presented by the Petition for Writ Certiorari.

OPINIONS BELOW

The opinions below are adequately set forth in the Petition for Writ of Certiorari.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition for Writ of Certiorari.

TREATIES AND STATUTES INVOLVED

The Water Code of the Yakima Indian Nation involved, Resolution T-79-77, is set forth in Appendix 1 (beginning at p. A-1).

COUNTERSTATEMENT OF THE CASE

The Historical Role of Primacy of State Water Right Laws and the Federal "Deference" Policy

Since the earliest days of settlement of the western states, federal policy has consistently been one of deference to the states in the enactment of water rights law and in the establishment and regulation of water rights thereunder. See *California v. United States*, 438 U.S. 645 (1978); *United States v. New Mexico*, 438 U.S. 696 (1978). This century-old policy of state water law primacy, founded on the overriding need for a unitary system of management and regulation of a transitory resource by a single administrator,[3] is so extensive that today many major federal activities, whether operated by the United States directly or through federal licensees, must look to state laws to obtain needed water rights. See *California v. United States, supra*. Indeed, state water rights laws are relied upon by the United States itself to satisfy various water right needs for federal lands, including *both* non-Indian and Indian reserved lands. See *United States v. New Mexico, supra*; *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984).[4] Further, even water rights which are established under federal law rather than state law, *i.e.*,

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[3]See 43 U.S.C. § 666 (1982); and *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976).

[4]In *Anderson, supra*, the Ninth Circuit Court of Appeals affirmed a district court "general adjudication" decree that confirmed the validity of a water right claimed by the United States, *established under state law*, authorizing both a diversion and a beneficial use of water within the Spokane Indian Reservation for a fish hatchery owned by the United States.

"reserved" rights, have been as a matter of federal policy administered through the mechanisms of state law. See *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983); *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976); and 43 U.S.C. § 666 (1982).

History of the Reservation—Present Landownership, Population and State Water Right Patterns

The Yakima Indian Reservation (hereafter "Reservation"), which is located primarily in the agriculturally rich Yakima River Basin of Washington, was established in 1855 by the United States pursuant to the Treaty with the Yakimas. 12 Stat. 951 (1855). See Pet. App. H, p. 41a. Over the past century, consistent with federal policies promoting non-Indian settlement of this Reservation of approximately 1,300,000 acres, ownership of lands within the Reservation has been transferred to non-Indians primarily pursuant to the Allotment Act of 1887, 25 U.S. C. § 331 *et seq.* (1982), and the Homestead Act of 1862, ch. 75, 12 Stat. 392. Thus, today, the Yakima Indian Reservation is not an enclave held exclusively for the use of tribal members.

At present, approximately eighty percent of the residents of the Reservation are non-Indians and approximately twenty percent of the lands of the Reservation are owned by non-Indians. See Pet., App. H, p. 4; *see Washington v. Yakima Indian Nation*, 439 U.S. 463 (1979). As to water use, these non-Indian residents of the Reservation have relied upon Washington's comprehensive water right laws for the establishment of water rights needed to carry on various activities within the Reservation. See Pet., App. H, p. 43a. This long-standing application of Washington's "codes" within the Reservation has included six decades of continuous regulation of the exercise of water rights held by many of the non-Indian residents of the Reservation who are plaintiffs in this litigation. This state regulation has been performed pursuant to a state court decree entered in

a "general adjudication" of water rights. See Pet. App. H, p. 43a-44a.[5]

The Scope and Purported Effect of the Tribal Water Code

On or about May 9, 1977, tribal officials of the Yakima Indian Nation (appellants here; hereafter "Tribal Officials") adopted by Resolution T-79-77, the "Yakima Nation Water Code" (hereafter "Water Code"). See App. 1.

This comprehensive Water Code, which controls water use throughout the Reservation, is extraordinary in numerous aspects. *First*, it applies to the entirety of the Yakima Reservation and to all water uses thereon by Indians and non-Indians alike. Thus, the Water Code's reach extends even to those waters on non-Indian owned land that are not required by the Tribe to satisfy the exercise of usufructuary interests in water recognized under the "reservation" doctrine of *Winters v. United States*, 207 U.S. 564 (1908). See App. 1, p. A-1, § I, p. A-4 and § III, p. A-7. *Second*, the Water Code includes a provision which mandates that all persons (with minor exceptions)[6] "using or claiming the right to withdraw or divert" waters on the Yakima Indian Reservation must file with the Chairman of the Yakima Tribal Council a "statement" of claim of a water right by December 31, 1987. See App. 1, §§ IV, V, and VI, pp. A-8, A-9. If this statement is not filed by that date, the water rights of said persons would be automatically "relinquished." See App. 1, § VIII, p. A-11. Thus, in terms of impact on existing rights, the Water Code's cutting edge *extinguishes* water

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[5]We note that the water rights of the Yakima Tribe relating to the Yakima River which flows through the reservation, are presently being subjected to confirmation and quantification in a state court "general adjudication" proceeding conducted pursuant to RCW 90.03.110 *et seq.*, a portion of the state's water code. See, e.g. *Department of Ecology v. Acquavella*, 100 Wn.2d 651, 674 P.2d 160 (1983). See, generally, *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983).

[6]See App. 1, § IX, p. A-11.

rights established under state law that have been long relied upon, exercised and used by non-Indians owning lands within the reservation. *Third*, the Water Code's "priority" criteria for making decisions as to how water will be used in the future within the Reservation is based, in primary part, upon the race of the individual landowner upon whose land the water is proposed to be used. See App. 1, § II, p. A-5 and § XIV, pp. A-16. *Fourth*, with the Water Code's establishment of the sole and exclusive methods for obtaining permission to use surface waters (by "permit") or ground waters (by "contract") within the reservation, the Water Code intrudes preemptively into an area of law occupied historically by water right laws of Washington enacted in accordance with the fundamental federal policy promoting the primacy of state water right law. See App. 1, §§ XV, XVII, pp. A-19, A-20.

History of this Litigation

It was against this background that on January 6, 1978 the State of Washington, together with fifty-two non-Indian residents of the reservation, two municipalities located within the Reservation established under state law (the cities of Toppenish and Wapato), and a public corporation also established under state law (Public Utility District No. 1 of Klickitat County),[7] filed an action challenging the Water Code in the United States District Court for the Eastern District of Washington. This action was filed as a test case in order to reduce the serious frictions that were rapidly increasing over the control and use of water, both within and without the Reservation, occasioned by enactment of the tribal Water Code.

The primary issue raised for resolution was an issue of first impression in the area of water rights law: namely, the authority of officials of an Indian tribe to adopt a comprehensive water rights code, applicable to all waters

[7]All of these plaintiffs (respondents here) own land and divert water (based on state rights) within the Reservation. The individual plaintiffs reside on the Glenwood area of reservation, which is predominately non-Indian in population.

within the Reservation, with its intrusive, preemptive, and confiscatory features.

The plaintiffs' complaint requested that the district court declare the Water Code invalid. The grounds supporting this request included, among others, a lack of tribal power to adopt such a comprehensive Water Code as well as various conflicts with provisions of the United States Constitution, including the due process and equal protection clauses of the Fourteenth Amendment and the "taking" clause of the Fifth Amendment.

The Tribal Officers' response to the plaintiffs' complaint, detailed on pages 4 and 5 of the Petition to which this brief responds, raised (by a motion to dismiss) the following threshold challenges to the district court's jurisdiction: (1) the tribal officers were immune from suit, (2) the plaintiffs failed to exhaust tribal remedies, (3) the plaintiffs lacked standing, and (4) there was no justiciable controversy. The two district court judges and the two panels of the court of appeals that examined these threshold issues have rejected them, as follows:

1. On January 31, 1979, the district court (Judge Marshall A. Neill) rejected the four jurisdictional challenges of the Tribal Offices just described (*see* Pet., App. D, p. 24a-32a);

2. That action was reaffirmed by the district court (Judge Justin A. Quackenbush) on September 17, 1983 and November 28, 1983;

3. On appeal, the Court of Appeals for the Ninth Circuit, by Memorandum dated October 12, 1984, affirmed the district court rulings on the four threshold issues (see Pet., App. B., pp. 9a-10a);

4. On remand to the district court, the Tribal Officers once again raised threshold jurisdiction issues, including the "exhaustion" issue. On September 6, 1985, the district court again rejected the Tribal Officers' contentions; (see Pet. App. C, p. 13a); and,

5. Finally, the Ninth Circuit, on March 3, 1987, rejected the Tribal Officers' second request for review of their threshold issues contentions based upon the doctrine of "law of the case." (See Pet. App. A, pp. 2a, 3a.)

As to the issues involving the power of a tribe to adopt the comprehensive "water code" and to apply it to "excess waters," the court of appeals affirmed the district court's declaration that the "Yakima Nation Water Code is invalid to the extent it purports to bestow tribal civil regulatory authority over such use of excess waters." See Pet., App. C, p. 19a.[8]

REASONS FOR DENYING THE PETITION

For the following reasons the rulings of the Ninth Circuit challenged by the Tribal Officers are not in conflict with the rulings of this Court. To the contrary, they are consistent therewith. The two contentions of the Tribal Officers, (1) exhaustion of tribal remedies and (2) tribal immunity, lack merit.

1. The Decisions of the Ninth Circuit Are Not In Conflict With Decisions Of This Court.

a. Exhaustion of Tribal Remedies.

The Tribal Officers rely on *National Farmers Union Insurance Company v. Crow Tribe*, 471 U.S. 845 (1985) and *Iowa Mutual Insurance Company v. LaPlante* 480 U.S.___, 94 L.Ed.2d 10, 107 S. Ct. 971 (1987), for the proposition that it is premature for a district court to determine that an Indian tribe has exceeded its authority until tribal remedies have been exhausted. Pet. p. 7. This reliance on *Crow Tribe* and *LaPlante* is completely misplaced. Those cases hold that, if at the time a federal district court suit is initiated a proceeding involving the same parties and the same dispute is already pending in a tribal court (which includes a challenge to the tribal court's jurisdiction to resolve that dispute), the federal court should not exercise its jurisdiction to resolve that

[8]The Tribal Officials appear to suggest that, because of the exercise of tribal discretion, their Water Code has not been enforced. In order to prevent any possible misunderstanding, the Court is advised that the Water Code has been stayed from enforcement by the district court (at the request of the respondents) since the Code's effective date. (E.R. 93, C.R. 43, 47; C.R. 54, 56, 86.)

challenge until the tribal court itself has been given a full opportunity to determine its own jurisdiction. See, *LaPlante*, 94 L.Ed.2d at 16, 20, n.8, 107 S. Ct. at 974, 976, n.8. This "concurrency" teaching of *LaPlante* has no applicability to a case, such as this one, where there is *no* counterpart case pending in tribal court (or other tribal forum) that would place the district court in a direct competitive position with a tribal entity.

Furthermore, even assuming *arguendo* that this case is in a concurrent jurisdiction posture, the "exhaustion" rule of *LaPlante* and *Crow Tribe* has no applicability where exhaustion would be "futile." *Crow Tribe*, 471 U.S. at 856, n. 21. As the court of appeals succinctly and persuasively stated in its Memorandum decision of September 6, 1984:

> [T]o require exhaustion of tribal remedies where the tribe's water code expressly asserts the very authority appellees dispute would also be to compel an entirely futile gesture.

Pet., App. B, p. 10a. This analysis of the court of appeals was written as to the self-executing Water Code enacted by the Tribal Officials that left no discretion, of pertinence here, to its implementing officers. See App. 1, p. A-11. That is, as described earlier, vested water rights (e.g., rights established under state law), are "relinquished" automatically, as matter of the operation of the water code, if a person holding such a right does not file a "statement of application" with the tribal court. Furthermore, in any exhaustion context, the Tribal Officials implementing the Water Code are left with no room to interpret the scope of the Water Code's coverage, for the Water Code sets forth, expressly and unambiguously, not only the purported tribal authority for its enactment but, as well, its all-encompassing application to all persons, to the entirety of the Reservation, and to all waters therein. In this context, especially where the ultimate review under the code would be performed by the same tribal body that enacted it, i.e., the tribal council, the futility exception to the rule of exhaustion applies. See App. 1, § XVII, p. A-20.

Montana v. United States, 450 U.S. 544 (1981), controls the processing of this case in its present posture. In *Montana*, as here, an Indian tribe, relying on its powers of "inherent sovereignty," adopted a resolution (Crow Tribe Resolution No. 74-5) relating to the regulation of natural resources, i.e., the regulation of fish and wildlife located within the reservation. Shortly after its adoption, the United States initiated a suit in federal district court to test the validity of the tribal ordinance through a request for declaratory judgment. No competitive proceeding was pending in any tribal forum. In this context, this Court granted review of the lower court's decision and ruled upon the tribal ordinance's validity.

This case mirrors the procedural posture of *Montana*. Shortly after the Yakima Tribal Water Code (which regulates all surface and ground waters located within the Resevation) was adopted, the State of Washington initiated a suit to test the validity of the Water Code. No competitive proceeding was pending in a tribal forum.

In sum, the procedures of *Montana*, not *LaPlante* and *Crow Tribe*, point the way as to the appropriate means for processing of this case. The procedural rulings announced and followed in the lower courts are faithful to relevant precedents of this Court.

b. **Tribal Immunity.**

Contrary to the Tribal Officers' position that the Ninth Circuit decision is in conflict with *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), the Ninth Circuit's ruling follows the rulings of this Court on sovereign immunity from suit, including *Martinez*. *Martinez* holds that neither the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (1970), nor, apparently, any other federal statute waived an Indian tribe's immunity from suit in federal courts. However, *Martinez*, 436 U.S. at 59, emphasizes that individual tribal officers are not "protected by the Tribe's immunity from suit" when they act outside of their authority or when the authority under

which they act is void. This accords with the longstanding doctrine, announced in *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949), that sovereign immunity will not bar a suit against a government official as an individual if the official's actions are not within the powers of the official's office. See also *Ex parte Young*, 209 U.S. 123 (1980), which was cited and relied upon in *Martinez*, 436 U.S. at 59.

In this case, the respondents (plaintiffs below) alleged that the Tribal Officers' actions in adopting the Water Code were not only actions that exceeded their powers under federal law, but were constitutionally invalid. Therefore, consistent with *Martinez* and *Larson*, the Ninth Circuit ruled correctly when it affirmed the district court's conclusion that claims against tribal officers in their individual capacities, when so acting, are not barred from suit by tribal immunity.

2. If the Court Grants the Petition, Question 3 of the Counterstatement of the Questions Presented, Pertaining to the Validity of the Tribal Water Code, Should Be Accepted for Review and Resolution by this Court.

A further comment regarding the immunity issue is necessary. In the "Restatement of Questions Presented," we noted briefly the direct relationship between (1) the respondents' contention that the Tribal Officers acted outside of their powers by enacting the Water Code, and (2) the issue of tribal immunity raised by the Tribal Officers. In this case, the district court ruled (and the court of appeals affirmed) that the Tribal Officials acted outside of their power when they adopted the Water Code which in accordance with its terms, applied to "excess waters" with the Reservation, i.e., to waters above those necessary to satisfy the exercise of tribal "reserved" rights. Pet. App. A, p. 7a, and App. C, pp. 19a, 22a. (This ruling was required in order to determine whether the action of the Tribal Officers was within their power and, thus, protected from suit by "immunity." See *Snow v. Quinault*

Indian Tribe, 709 F.2d 1319, 1322, (9th Cir. 1983), *cert. denied*, 467 U.S. 1214 (1984.) By this ruling, the denial of a motion to dismiss on sovereign immunity grounds was decided properly.

The Tribal Officers have not expressly petitioned the Court to review this *primary* issue dealt with by the contesting parties and the lower courts; namely, the exhaustively briefed and vigorously argued issues pertaining to the validity of the tribal Water Code. However, in order to resolve the tribal immunity issue expressly raised by the petitioners the issue of the tribal Code's validity must be decided by this Court. The immunity question and the question of the validity of the Water Code's application to excess waters are inextricably linked and, indeed, are for all practical purposes one and the same. Accordingly, the latter issue is "fairly included" by the Tribal Officer's petition as an issue for resolution by this Court if the Petition for Writ of Certiorari is granted as to the two issues expressly set forth in that petition. *See* U.S. Sup. Ct. Rule 21.1.

This explanation is provided because, if the pending Petition for Writ of Certiorari is granted, it is clearly appropriate, if not mandatory, for this Court to resolve the issue of the Water Code's validity. Acceptance of this necessarily implicated issue would also resolve a significant issue of water law that needs resolution at an early date. There are rapidly increasing tensions and conflicts over water use in the arid west resulting from the ill-conceived intrusion of tribal water codes directly into areas of water rights law and administration occupied historically by states. Those intrusions threaten to undo the unitary, comprehensive state property system for water allocation that has been long relied upon by large and small water users alike in the Yakima Valley of Washington and other similarly situated water-short valleys in the arid west. See, e.g., *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984). Additionally, policies of both judicial economy and the alleviation of economic hardship on litigants (e.g., small-farm owning respondents) support resolution of the issue of the Water

Code's validity at this time. By not expressly requesting review of the primary issue dealt with by the lower courts, the Tribal Officers have triggered a most unsatisfactory process for resolution of the important issues of this case that, unless rectified, threatens to place a heavy cloud of extended litigation, lingering on for years if not decades, over constitutionally protected property interests held by property owners with limited financial resources.

To submit that this question is important is not, however, to suggest that it necessarily merits review by this Court; for the decision of the Court of Appeals on the question of tribal authority is clearly correct. In ruling on that question, the Court of Appeals followed its decision in *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984). *Anderson*, in turn, applied the criteria for determining the validity of an assertion of tribal jurisdiction over non-Indians as established by this Court in *Montana v. United States*, 450 U.S. 544 (1981). See Pet. 3a-7a for the Court of Appeals' discussion of *Anderson* and *Montana*. As there noted:

> The court [in *Anderson*] found no consensual agreement between the tribe and the non-Indian water users or conduct which threatened or had such a "direct effect on the political integrity, the economic security, or the health or welfare of the Tribe,' as to confer tribal jurisdiction." *Anderson*, 736 F.2d at 1365 (quoting *Montana v. United States*, 450 U.S. 544, 566 (1981)).

Pet., App. A, p. 4a.

So too here, for the same reasons as in *Anderson*, the *Montana* criteria for jurisdiction over non-tribal members are clearly not met. Further, in *Montana*, the Tribe was attempting to reserve for its own members all fish and wildlife within the reservation, including those found on non-Indian lands. Here, the Yakima Nation is attempting to do essentially the same thing with respect to excess waters.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied. However, if the

Petition is granted, the Court is requested to expressly set forth as an issue to be resolved by this Court the issue necessarily implicated (as described in question 3 on page i hereof) by the express issues contained in the "Petition for a Writ of Certiorari."

Dated: July 27, 1987.

Respectfully submitted,

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APPENDIX 1
RESOLUTION T-79-77
YAKIMA NATION WATER CODE

AWARE of the terms of the *Treaty with the Yakimas*, (12 Stat. 951), and the "Record of the Proceedings of the Walla Walla Treaty Council" which provide that the Yakima Indian Reservation shall be reserved by the Yakima Nation for the purpose of establishing an independent exclusive political and economic community for members of the Yakima Nation; the Yakima Nation is hereby establishing a water code covering all of the waters that arise on, border, traverse, or underlie the Yakima Indian Reservation establishing all rights, title and interest in said waters and regulating the use thereof. Some applicable portions of the Treaty and Record of Proceedings are as follows:

"**Reservation.**

ARTICLE II. There is, however, reserved from the lands above ceded for the use and occupation of the aforesaid confederated tribes and bands of Indians, the tract of land included within the following boundaries, to-wit;

Boundaries.

Commencing on the Yakama River, at the mouth of the Attah-num River; thence westerly along said Attah-nam River to the forks; thence along the southern tributary to the Cascade Mountains, thence southerly along the main ridge of said mountains, passing south and east of Mount Adams, to the spur whence flows the waters of the Klickitat and Pisco rivers, thence down said spur to the divide between the waters of said rivers; thence along said divide to the divide separating the waters of the Satass River from those flowing into the Columbia River; thence along said divide to the main Yakama, eight miles below the mouth of the Satass River; and thence up the Yakama River to the place of beginning.

All of which tract shall be set apart and, so far as necessary, surveyed and marked table.

Before you met my brother and myself in council, you have your own council; and the Great Father when he acts has his council also, he has his chiefs.

When I saw the Great Father he called his chiefs together, and had a council about you. He has two chiefs who have the care of the red men, their names are Gen'l Orr and Robert Johnson, and I want you to remember

them. Robert Johnson lives near John Ross; they both told me that what had been done for John Ross should be done for you, and more as I will tell you.

As we grow older we learn more and grow wiser; so of the Great Father and his chiefs; they did much for John Ross and his people twenty years ago; they have learned much since and know better what to do; they find one thing however the same now as then.

They gave John Ross and his people a tract of land into which no white man could go without their consent; they sent them an agent, they had schools, they had mills, they had shops, they had teachers, they had farmers, they had doctors. I repeat again no white man could go there unless the red man consented to it. * * *

There are other tracts of land East of the Mountains set apart for the red man's home; for there are many tribes. Those tracts the white man cannot enter without the consent of the red man. On all these tracts the red man has schools and farms and mills: they have teachers, and physicians and an agent.

Now listen carefully: On these tracts the land was all in common: there were one or more larger fields for the tribes but no man had his special field: the Great Father and his chiefs now think that is not good: the Great Father said, the white man has his farm, his cattle and his horses; the red man shall have his farm, his cattle and his horses; the Great Father says that when on that tract of land an Indian has his field, that field should be his.

This brings us now to the question. What shall we do at this council? We want you and ourselves to agree upon tracts of land where you will live; in those tracts of land we want each man who will work to have his own land, his own horses, his own cattle, and his own home for himself and his children. * * *

Then you the men will be farmers and mechanics, or you will be doctors and lawyers like white men; your women and you daughters will then teach their children those (fol. 106) who come after them to spin, to weave, to knit, to sew, and all the work of the house and lodges, you will have your own teachers, your own farmers, blacksmiths, wheelwrights and mechanics: besides this we want on each tract a saw mill and a grist mill.

Now we want you to agree with us to such a state of things; You have your tract with all these things; the rest to be the Great Father's for his white children." (Folio.

105-106, Transcript of Treaty Proceedings).

Governor Stevens said:

"I have a word to say in answer to the remarks of Skloom. Proposals have been made for the lands of the Yakimas and their neighbors; a place has been pointed out for the Yakimas to live in; outside of this place the gardens and farms are to be paid for in money in a fair value. The price paid will probably be a good deal more then the price he has mentioned for those gardens. I say to Skloom, we do sell good lands for Eight Hundred Dollars a mile, but not in this country. We do not expect to sell any of this land." (Record of Treaty Proceedings, Folio 135).

"April 3rd, Tuesday, at 10:00 a.m., the Indians had assembled to the number of 200 and the chiefs were present viz Te-ay-as, Owhi, Kam-i-ah-kun, Shaw-a-way and Skloom. Revd. M.C. Pandosy was also present by my invitation. The council was opened and I proceeded to explain to them why they had been called together; the objects had in view by the Government in desiring to treat with them, and the general nature of the Treaty, it was proposed to hold with them. The government desired to purchase all their country. One or more reservations would be set aside for their use and to belong to them forever. Upon the reservation they would be required to live. There they could build their houses, cultivate farms, and pasture their cattle and horses." (Journal of James Doty, Secretary of Treaties for Washington Territory.)

Aware of the Yakima Nation's inherent sovereignty and right of self government and the right to make its own laws as specified in the Treaty Proceedings at Walla Walla, as quoted above, the Yakima Nation does hereby promulgate its water code for the purpose of using, conserving and preserving, regulating its reserved water rights in all waters, arising on, bordering, traversing or underlying the Yakima Reservation for the purpose of using the Yakima Indian Reservation as a permanent, viable home and abiding place for the Yakima Indian Nation and its members.

CONSCIOUS of the basic law which provides that water which border, traverse, arise on, or underlie Indian reservations is reserved for the use of Indians on said reservations, the Yakima Nation does promulgate this water code for the purpose of regulating, using, preserving, conserving, allocat-

ing and using the reserved water guaranteed by treaty. This right is founded on the reservation by treaty of the lands and other natural resources like water to allow Indians within that reservation to maintain a viable Indian community. *United States v. Ahtanum Water District*, 236 F. 2d 321 (C.A. 9-1956); Cert. denied 352 U.S. 988 (1956); 330 F. 2d 897, (C.A. 9-1965) 338 F. 2d 307 (C.A. 9-1965); Cert. denied 381 U.S. 924 (1965); *Winters v. United States*, 207 U.S. 564, (1908). In likewise specific terms, it has been judicially decreed in *United States v. Ahtanum Irrigation District*, *supra*, that the Yakimas use to the waters is not subject to appropriation, acquisition or administration under state laws. The Secretary of Interior has likewise failed and refused for some 89 years to promulgate any rules for the just and equal distribution among the Indians residing on the reservations other than those contained within established irrigation projects and has made no provisions for the distribution or regulation of any ground waters.

AWARE of these facts and law, the Yakima Nation does hereby promulgate its water code for the purpose of regulating, administering, preserving and conserving these reserved waters within the Yakima Indian Reservation in the best interests of said Yakima Indian Reservation as a viable Indian community as established in the *Treaty with the Yakimas.*

NOW, THEREFORE, BE IT RESOLVED, by the Yakima Tribal Council as follows:

I.
PROCLAMATION ANNOUNCING TITLE OF THE YAKIMA INDIAN NATION TO ALL RIGHTS TO THE USE OF WATER THAT BORDERS, TRAVERSES, ARISES UPON OR UNDERLIES THE YAKIMA INDIAN RESERVATION.

KNOW ALL MEN BY THESE PRESENTS that:

The Yakima Indian Nation is the owner of all the full equitable title to the rights and to the use of all the water resources which arise upon, border, traverse, or underlie the Yakima Indian Reservation. The United States can hold only the naked legal title to these rights to the use of water acting

only as trustee in a fiduciary relationship with the Yakima Indian Nation and its members. The full equitable title of the Yakima Indian Nation to its reservation and resources (which title includes the rights to the use of all water resources upon the reservation, repeatedly recognized by the courts and Congress) reside undiminished in the Yakima Nation. The United States of America is legally responsible to preserve, protect, conserve the rights of the use of water above described solely for the benefit of the Yakiam [sic.] Indian Nation and its members. The Yakima Indian Nation has the legal responsibility to preserve, protect, conserve and equitably administer and regulate the use of said waters.

The Yakima Indian Nation has previously proclaimed the right to regulate waters in Resolution T-5-70.

II.
PURPOSE AND PRIORITIES

The future growth and development of the Yakima Reservation and the Yakima Nation is dependent upon affective management and efficient use of the Yakima Nation's reserved water resources. These regulations are adopted to provide adequate records for efficient administration of the Yakima Nation's water and in order to protect and conserve the water supply reserved by Indians of the Yakima Indian Reservation.

These regulations in this resolution set forth the policies and administrative procedures that will be adhered to in allocating the use of waters so reserved. The first priority for the use of waters shall be for a public or tribal use when so dedicated by the governing body of the Yakima Indian Nation. The next priority shall be to secure a just and equal distribution of those reserved waters for the Yakima members residing on the reservation, farming or otherwise using their allotments in their own enterprise and for allotments being farmed or otherwise used by the Yakima Indian Nation. If there be waters available after these lands have been furnished with adequate waters, then the next priority shall be for a just and equal distribution among Tribal allotments and among allotments of Yakima members holding trust restricted or allotted lands who do not farm or use their lands

in their own enterprise. If there be waters available after these lands have received an adequate amount, then the next priority shall be among Yakima members holding trust restricted or allotted lands who do not live on the reservation. If there be waters available after these lands have received an adequate amount, then the next priority shall be for a just and equal distribution among lands held by Yakima members that are not in a trust or restricted status. If there be waters available for use after these lands have received adequate water, then the next priority shall be for a just and equal distribution among other formally allotted lands on the reservation or among allotments held by Indians who are not members of the Yakima Nation. In determining the distribution of the waters among these non-trust or non-restricted lands specified in the foregoing sentence, the amount of water being used at that time they passed from Indian ownership shall determine and control the amount of water that shall be used on said lands. It is not the purpose of this code to regulate the individual use of water within statutory irrigation projects such as the Wapato-Satus unit, additional works unit, Ahtanum unit, and Toppenish-Simcoe unit of the Wapato Irrigation project where the water is being used or applied pursuant to the direction of the project engineer of the Wapato Project. Where waters are being used within said statutory irrigation projects on the Yakima Reservation within the administration of said project engineer, the United States of America through said project engineer will be responsible to make application and contract with the Yakima Nation in regards to the use of said waters. It is to be understood that it is the purpose of this water code to provide for a system whereby the project engineer will negotiate and contract with the use of reserved waters with the Yakima Nation on a collective basis and will then be responsible for the regulation and the use of said collective waters within said statutory irrigation projects.

III.
DEFINITIONS

Unless a different meaning is plainly required by the context of this resolution, the following words and phrases

used in this resolution shall have the following meanings.

(1) "Person [sic.] shall mean an individual, partnership, association, public or private corporation, city or other municipality, county or a state agency, and the United States of America using or claiming water rights reserved by the Yakima Nation.

(2) "Beneficial Use" shall include, but not be limited to, use of domestic water, livestock irrigation, fish, shellfish, game and other aquatic life, municipal, recreation, industrial water, generation of electric power, and navigation.

(3) "Ground waters." All waters that exist between the land surface or beneath the bed of any stream, lake or reservoir, or other body of surface water within the boundaries of the Yakima Indian Reservation, whatever may be the geological formation or structure in which water stands or flows, percolates or otherwise moves.

(4) "Yakima Member or Member" shall mean any member of the Yakima Nation enrolled under the act of August 9, 1946, as amended (60 Stat. 969, 25 USC 601 and following).

(5) "Indian" shall mean any enrolled member of an Indian tribe recognized by the United States of America.

(6) "Reserved Waters" mean those waters, arising on, flowing through, underlying or bordering the Yakima Indian Reservation. This shall include both ground and surface waters, springs, wells natural lakes and ponds.

(7) "Just and equitable distribution" means a method of allocation of the available reservation waters in conformity with the purpose of the Yakima nation among those using them in such a manner that those in the same class and similarly situated will be given a equal opportunity to make beneficial use of the water.

(8) "Beneficial use" means any use of water, by consumption or otherwise, including but not limited to industrial, domestic, or agricultural purposes.

(9) "Project Engineer" shall be an engineer of the Bureau of Indian Affairs who is authorized to administer the Wapato Irrigation Project.

IV.
CLAIM OF RIGHT TO WITHDRAW, DIVERT OR USE GROUND OR SURFACE WATERS—FILING OF CLAIM REQUIRED—EXEMPTIONS

All persons using or claiming the right to withdraw or divert and make beneficial use, of surface or ground waters on the Yakima Indian Reservation, except as hereafter exempted from compliance in this resolution, shall file with the Chairman of the Yakima Tribal Council, not later than December 31, 1977, a statement of application for use for each water use or claim on a form provided by the Yakima Tribal Council.

V.
STATEMENT OF CLAIM—CONTENTS

Statement of application shall include substantially the following:

1. Name and mailing address and phone number of the applicant.

2. The source of water supply by naming the stream from which water is taken; if the water is from a well, a legal description of the land where the well is located and the approximate location of the well within the lands described.

3. A description of the land where the water is being used and the purpose for which it is being used (for example, household livestock, agriculture, recreation, industrial, municipal, generation of electricity.)

4. The quantities of water and the time of use claimed.

5. The approximate date of first putting water to beneficial use for the various amounts and times claimed in subsection 3.

6. The legal doctrine or doctrines upon which any water right claimed is based including, if statutory, the specific statute.

7. The sworn statement that the application set forth is true and correct to the best of claimants knowledge and belief.

If in the discretion of the Tribal Council or its agents, more complete data is required of the applicant, additional information may be requested by the Yakima Indian Nation.

The filing of the application shall be considered authorization of the Yakima Tribal Council, or their designated agents and representatives, to go upon the lands or properties to the applicant for the purpose of obtaining required information or to verify the information which has been received.

VI.
STATEMENT OF CLAIM--FORM

The statement of claim form furnished by the Tribal Council shall be substantially in the following form:

WATER USE APPLICATION

INFORMATIONAL FILING

Name_____

Address_____

_____ Zip Code_____ Phone No. _____

2. Source From Which the Right to Take and Make Use of Water is Claimed: _____
Surface or Ground Water

_____

A. If Ground Water, the Source is_____

B. If Surface Water, the Source is_____

3. The Quantities of Water and Times of Use Claimed: _____

A. Quantity of Water Claimed_____ Presently Used: _____

_____
(Cubic Feet Per Second or Gallons Per Minute)

B. Annual Quantity Claimed_____ Presently Used: _____

_____
(Acre Feet per Year)

C. If For Irrigation, Acres Claimed_____

Presently Irrigated_____

D. Time(s) During Each Year When Water is Used: _____

4. Date of First Putting Water to Use: Month_____ Year_____

5. Location of the Point(s) of Diversion/Withdrawal: _____

Feet_____ and_____ Feet_____ From the_____

_____ Corner of Section_____

Being Within_____ of Section_____, T. _____

N.R. _____ (E. or W.) W.M.

If This is Within the Limits of a Recorded Platted Property, Lot_____

_____ Block_____ of_____

_____
(Give Name of Plat or Addition)

6. Legal Description of Lands on Which the Water is Used: _____

_____

_____

_____

_____ County_____

7. Purpose(s) For Which Water is Used: _____

8. The Legal Doctrine(s) Upon Which Any Right of Claim is Based: _____

Do Not Use This Space	I hereby swear that the above information is true and accurate to the best of my knowledge and belief.
The filing of a statement of claim does not constitute an adjudication any claimed right to use of waters. This acknowledgement constitutes receipt for the filing fee.	X_____
Dated Returned: This Has Been Assigned Water Right Claim Registry No.	Date: _____ If Claim filed by designated representative, print or type full name and mailing address of agent below.
	_____
	_____
	☐ Additional information relating to water quality and/or well construction is available.

If the foregoing form is not adequate to contain the required information, any form that satisfies the requirements of the foregoing section shall suffice.

VII.
STATEMENT OF APPLICATION—FILING PROCEDURE PROCESSING OF APPLICATION—FEE

The filing of a statement of the application shall take place and be completed upon receipt by the Chairman of the Yakima Tribal Council or his agent, at his office in Toppenish, Washington of an original statement signed by the applicant or his authorized agent, and two copies thereof. Any person required to file herein may file through a designated representative. The United States when furnishing person [sic.] water within statutory irrigation projects on the Yakima Reservation shall have the right to file one claim on behalf of said persons on a form that shall show the total benefits for each person served providing that a separate claim shall be filed by said United States for each operating unit and for each water source. Within thirty days after the receipt of a statement of claim, the Yakima Tribal Council chairman, or his agent, shall acknowledge the same by a notation on one copy indicating receipt thereof and the date of receipt and shall return said copy by prepaid mail to the applicant at the address set forth in the application. No application shall be accepted for filing by the Yakima Tribal Chairman unless accompanied by a $25.00 filing fee.

VIII.
FAILURE TO FILE APPLICATION WAIVES AND RELINQUISHES ANY EXISTING RIGHT

Except as hereinafter provided, any person using or claiming the right to divert, use or withdraw waters on the Yakima Indian Reservation, who fails to file said application as herein provided shall be conclusively deemed to have waived and relinquished any use of said water and any claim for any right, title or interest in said water.

IX.
EXEMPTIONS FROM ACT.

The following uses, withdrawals or diversions are exempt from the provisions of this resolution.

A) Any withdrawal of ground waters for stock watering purposes or for watering of a lawn of a non-commercial garden not exceeding one-half acre in area, or for a single or group domestic use in an amount not exceeding 5,000 gallons a day, or for an industrial puprose [sic.] in an amount not exceeding 5,000 gallons a day, is and shall be exempt from the provisions of this resolution.

B) Any use or diversion by an individual, partnership, association, public or private corporation, city or other municipality, county, state agency in the State of Washington, when claiming that use of and diversion is under the direction within the confines of a statutory irrigation project [sic.] United States of America through the project engineer for the Wapato Irrigation Project where there is no other claim to the use of said water other than the right to receive a delivery through the Wapato Irrigation Project; shall be exempt from the provisions of this resolution.

Provided, that at the option of the party making withdrawal use or diversions of waters as specified in A and B above, applications may be made under this resolution and where made, shall be considered as a request on the part of the applicant to fall within the regulations and regularoty [sic.] power of the Yakima Indian Nation as provided herein.

Provided, that the Yakima Tribal Council, from time to time may require that the person making any such withdrawals as contained in A and B to furnish information as to

the means for and the quantity of that withdrawal, use or diversion.

X.
WATER RIGHTS NOTICE FORM

The Yakima Tribal Council shall, within thirty days, of the enactment of this resolution, give the following notice in writing as hereinafter provided:

> "WATER RIGHTS NOTICE. Every person, including but not limited to an individual, partnership, association, public or private corporation, city or other municipality, county, state agency in the State of Washington, the State of Washington and the United States of America when using or claiming the right to use, divert or withdraw waters within the Yakima Reservation, are hereby notified that all water rights or claimed water rights relating to the use, withdrawal or diversion of surface or ground waters within the Yakima Reservation, must be registered with the Yakima Tribal Council, Toppenish, Washington, not later than December 31, 1977. FAILURE TO REGISTER AS REQUIRED BY TRIBAL COUNCIL RESOLUTION WILL RESULT IN A WAIVER AND A RELINQUISHMENT OF SAID USE OF WATER RIGHT OR CLAIMED WATER RIGHT. There are some exemption [sic.] for minor uses of water of less than 5,000 gallons a day and where water is delivered by the Wapato Irrigation Project. For further information contact the Yakima Tribal Council for a copy of the appropriate resolution."

XI.
NOTICE OF RESOLUTION PROVISIONS, HOW GIVEN, REQUIREMENTS.

To insure that all persons referred to in this resolution are notified of the registration provisions of this resolution, the Chairman of the Yakima Tribal Council is directed to give notice of the registration provisions of this resolution as follows:

1) He shall cause said notice in writing to be placed in the Yakima Nation Review, in the Yakima Daily Republic, Toppenish Review, and Wapato Idependent [sic.], as [sic.] least once each week for three consecutive months.

2) He shall cause the above water rights notice to be

mailed in writing to the following addresses within thirty (30) days after the adoption of this resolution:

NEWS MEDIA:
Yakima Herald Republic
P.O. Box 1618
Yakima, Washington 98907

KNDO TV
P.O. Box 466
Yakima, Washington 98907

KIMA Television Center
P.O. Box 702
Yakima, Washington 98907

KMWX Radio
P.O. Box 1460
Yakima, Washington 98907

KBBO Radio
P.O. Box 172
Yakima, Washington 98907

KUTI Radio
P.O. Box 261
Yakima, Washington 98907

KQOT Radio
P.O. Box 1194
Yakima, Washington 98907

KIT Radio
P.O. Box 1222
Yakima, Washington 98907

KAAR Radio
P.O. Box 2795
Yakima, Washington 98907

KAPP TV
P.O. Box 1747
Yakima, Washington 98907

Toppenish Review-Mirror
11 E. Toppenish Avenue
Toppenish, Washington 98948

Tri-City Herald
Pasco. Washington

Prosser Record Bulletin
613 7th
Prosser, Washington

Grandview Herald
107 Division
Grandview, Washington 98930

Others:

Department of Ecology
Olympia, Washington 98501
Attention: Water Resources

Yakima Project
Bureau of Reclamation
Yakima, Washington 98901

3) Within thirty (30) days after the adoption of this resolution, he shall cause a notice in writing to be placed in a prominent and conspicuous location in the Yakima County and Klickitat County Courthouses.

4) He shall also in his discretion give notice in any other manner which will carry out the purposes of this resolution.

XII.
WATER REGISTRY AND DISPOSIITON [sic.] OF APPLICATIONS FOR PERMISSION TO USE WATER

The Yakima Tribal Council shall establish a registry entitled "Water Application Registry." The original copy of all applications delivered pursuant to this resolution shall be filed in the registry alphabetically and shall receive a control number. Each application shall have clearly marked upon the application the date and hour when the application was received at the Tribal Office in Toppenish, Washington.

The second copy of the application for permission to use water within the Yakima Indian Reservation, will be separated and segregated by authorized personnel on the basis of subwater shed, stream system or other common source of

supply. These applications shall be filed in the order in which they were received and dated as provided above.

XIII.
WATER RESOURCES BOARD

The Yakima Indian Nation, acting through its Yakima Tribal Council, will appoint a water resources board consisting of three (3) persons, which shall include a chairman and two members. The chairman shall be appointed for a term of three years, the second members for a term of two years and the third member for a term of one year. The Yakima Tribal Council will likewise appoint such staff and provide such space as is necessary for the work of said board.

Said board shall have authority to promulgate and provide rules of procedure for adjudications and hearings before said Water Resources Board.

It will be the responsibility of the water resources board to determine whether the Yakima Indian Nation will permit water to be used, withdrawn or diverted by the applicants who have made filings as required in this resolution.

The Water Resources Board shall, as the principal agent of the Yakima Nation, protect, preserve, conserve and regulate the use of the Nation's right to use of water and make determinations respecting the permission of the use of water within the Yakima Indian Reservation. In the performance of these duties, the Water Resources Board is authorized and directed to utilize in addition to the employess [sic.] of the Waters Resources Board the technical services respecting hydrology, land use, geology and related pertinent sciences, which the Yakima Nation presently provides and all available qualified personnel of the Bureau of the Indian Affairs. In the event expert advice for assistance in regards to the performance of its functions is not presently available, the Water Resources Board, is authorized to contract for those services. Any such contract must be approved by the Yakima Tribal Council.

XIV.
CLASSIFICATIONS, PRIORITY, STANDARDS AND CRITERIA GOVERNING WATER BOARDS DETERMINATION

In making its determination as to whether an application for permission to use water resources of the Yakima Indian Nation shall be granted or rejected, in whole or in part; the water resources board will be guided by the following classifications, standards, priorities and criteria:

1) The water board shall not take any private property for public use without just compensation. (25 USC 1101).

2) The water board shall not deny to any person the equal protection of laws or deprive any person of liberty or property without due process of law. (25 USC 1101). In following this direction, the water board shall make every effort to give equal and just treatment to all persons within the same classification of use.

3) The Water Board shall consider its primary objective that the Yakima Indian Reservation and the reserved water rights in the Yakima Indian Reservation were reserved for the purpose of establishing the Yakima Indian Reservation as a permanent, viable home and abiding place for the Yakima Indian Nation and its members and for the purpose of providing an independent political and economic community for the Yakima Indian Nation and its members.

4) The following classification and priorities are established and will be adhered to in allocating the use of waters reserved by the Yakima Indian Nation.

A. Class A. **Use.** The first priority for the use of waters shall be for their tribal or public use when their public or tribal use is dedicated by a resolution of the Tribal Council of the Yakima Indian Nation. It is understood and agreed that the Yakima Indian Nation is hereby dedicating the use of all ground waters, except as herein limited, as a tribal enterprise for the purpose of delivery of water to water users within the reservation on a contract basis.

B. Class B. **Use.** If there are waters available after the use above, then for such other purposes as shall be directed by Yakima Tribal Council resolution for tribal enterprise.

C. Class C. **Use.** If there are waters available, after the

use above, then the next priority shall be to secure a just and equal distribution of reserved waters for Yakima members residing on the Yakima Reservation for farming or using their allotments in their personal enterprise and for allotments being farmed by the Yakima Indian Nation.

D. Class D. **Use**. If there are waters available after the uses in A, B and C above have been furnished with adequate waters, then the next priority shall be for a just and equal distribution among tribal allotments and among resident Yakima members holding trust, restricted, or allotted lands who do not farm their lands.

E. Class E. **Use**. If there are waters available after the uses in A, B, C and D above have been furnished with adequate waters, then the next priority shall be among Yakima members holding trust, restricted or allotted lands who do not live on the reservation.

F. Class F. **Use**. If there are waters available after the uses in A, B, C, D and E above have been furnished with an adequate amount, then the next priority shall be for a just and equal distribution among the lands held by Yakima members that are not in a trust or restricted status and among Indians (not Yakima members) who hold lands in a trust or restricted status,

G. Class G. **Use**. If there are waters available after the uses in A, B, C, D, E, and F have received adequate water, then the next priority shall be for a just and equal distribution among other formerly allotted lands on the reservation. In determining the distribution of waters among these Class G lands, the amount of water being so used at the time they passed from Indian ownership shall determine and control the amount of the water that shall be used on said lands.

5. Multi-service diversions and distributions, such as the Wapato project, are to be preferred as incompassing as near as possible all the reserved waters that would be furnished to the uses within such a multi-service diversions or distribution system as would be furnished under the foregoing priorities if individual application was to be made. In making application for a water permit the project engineer shall specify the amount of use contemplated for each user group.

6. Uses of water for domestic, stock watering, industrial,

commercial, agricultural, irrigation, hydro-electric power production, mining, fish and wildlife maintenance and enhancement, recreational and thermal power production purposes, and preservation to environment and esthetic values and all other uses compatible with the creation of a viable, independent Indian community on the Yakima Reservation, are declared to be beneficial.

The Yakima Tribal Council may be [sic.] resolution create a priority type of use in amount or in area by resolution at any time, but this action shall not effect permitted use of lower priority during the term of an existing permit.

7. In evaluating whether the continued use of water by an applicant is for the benefit of the Yakima Indian Naiton [sic.] and the Yakima Reservation, it is essential for the Water Resources Board to consider in addition to other factors, whether an applicant and other applicants to the common source of supply, have overappropriated that source of supply and if complete or partial reduction in the use from that source of supply is essential to avoid the continued over-appropriation.

8. In considering the allocation of water, the Water Resources Board shall take into consideration whether the waters of a particular common source of supply can be better used among the foregoing use classifications for purposes other than those to which the applicant or applicants are presently using the water. In this regard, the Water Resources Board shall follow the list of priorities promulgated by the Yakima Tribal Council.

9. In determining the allocation of water within the various classifications above set forth, the Water Resources Board shall take into consideration the use of water that has been made on the land during the five previous years and not just the immediate use during the calendar year.

10. In granting permits for the use of water to any applicant other than the Yakima Indian Nation, the period of permitted use shall not exceed ten years. At least one year prior to the expiration of said permitted use, the water resources board shall again re-examine the allocations of the water on any common water supply upon application being made by the applicant in the same manner as heretofore originally

provided for. Notice of the necessity to refile for the use of waters shall be sent to all permittees at least 500 days prior to the expiration of their permit at the addresses on their applications. Such notice shall specify the time during which applications must be filed and that the permitted right will expire if no application is filed.

XV.
NO USE WITHOUT PERMIT—TEMPORARY USE, WITHDRAWAL AND DIVERSIONS OF WATER LIMITED TO USE MADE IN 1976 CALENDAR YEAR

After the effective date of this resolution, no use, withdrawal or diversion of surface or ground waters within the Yakima Reservation shall be begun nor shall any well or other works for such withdrawal, use or diversion be constructed; unless a permit to use said waters has been granted by the Yakima Indian Nation. Provided however, that during the year 1978, use, diversion and withdrawal made by any person during the calendar year in 1976 shall be permitted to temporarily continue unless said person has been notified in writing by the Yakima Tribal Council that said use is not permitted.

After June 1, 1978, no use, withdrawals or diversions of surface waters or ground waters within the Yakima Reservation shall be begun, or continue, nor shall any well or other works for such withdrawal use and diversion be constructed, unless an application to use such waters has been made to the Yakima Tribal Council and a permit has been granted as herein provided.

XVI.
HEARINGS ON PERMIT

Prior to granting of any permit or the denial or the limiting of use by the Water Resources Board, of any application, the Board shall have a full hearing upon the subject called specifically for that purpose by the Board. The Board may combine the hearing on any one application with multiple applicants using water from a common source of supply.

Applicants will be given notice in writing addressed to

their address specified in their application and placed in the United States mail, postage prepaid at least thirty days prior to the date set for hearing. The hearing will be conducted by at least a majority of the water board and the applicant will be accorded an opportunity to fully present the basis of his claim and data in support of it. Hearings by the Water Resources Board will be initiated, notices [sic.] and conducted in accordance with the rules of procedure promulgated by the Water Resources Board. At the conclusion of the deliberations by the Water Resources Board, they will notify applicants in writing of their decision.

XVII.
APPEALS

Any applicant who is aggrieved by the decision of the Water Resources Board, may appeal the decision of the Water Resources Board within thirty days of the mailing of the notice of the decision of the Water Resources Board. Said aggrieved party must file his notice of appeal with the Chairman of the Yakima Tribal Council within the said time period. The Yakima Tribal Council will then on the record, consider the appeal and shall render its decision in regard within six months of the decision of the Water Resources Board. The decision of the Yakima Tribal Council will be final.

XVIII.
GROUND WATER ENTERPRISE

The Yakima Indian Nation will establish wells for the withdrawal of all ground waters on the Yakima Indian Reservation with the exception of the limited use exemptions herein specified. All future wells will be drilled or dug by the Yakima Indian Nation on lands in which ownership has been transferred to the Yakima Indian Nation or upon which adequate easements for ingress and egress for the purpose of maintenance and water delivery have been provided. Contracts with users will be made permitting withdrawals of a certain quantity from said wells. Where there are existing wells on the reservation, withdrawing water in excess of the exemptions herein provided, no withdrawals shall be made

after June 1, 1978 until there is a contract for withdrawal made with the Yakima Indian Nation. Said contract regarding existing wells, shall provide for an easement for ingress and egress for maintenance and water delivery regarding said wells or conveyance of the lands in which they are contained and shall provide for reimbursement for the cost of said wells either through the payment of money or the crediting of moneys from the use of said water toward said purchase price.

XIX.
PENALTIES FOR VIOLATION OF CODE

Violation of any provisions of this code or any regulations or proclamations issued thereunder shall be punishable in the Yakima Tribal Court for each and every offense, by a penalty or punishment not greater than imprisonment for a term of six months or $500.00 or both.

PASSED BY A VOTE OF THE YAKIMA TRIBAL COUNCIL at the Yakima Indian Agency at Toppenish, Washington, a quorum being present by a vote of 12 for and none against on this 9th day of May, 1977

/s/
Watson Totus, Chairman
Yakima Tribal Council

ATTEST:

/s/
Joe Sampson, Secretary
Yakima Tribal Council